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APPENDIX

EXHIBIT “A”

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA, No. 97-091 (JAF)

v. Hato Rey, Puerto Rico
July 11, 2000

JORGE GARIB BAZAIN,

Defendant.

TRANSCRIPT OF SENTENCING HEARING

BEFORE THE HONORABLE JOSE ANTONIO FUSTE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government: MARIA DOMINGUEZ, AUSA
EDNA ROSARIO, AUSA
US Attorney's Office

For Defendant
Jorge Garib: CHARLES FITZWILLIAM, ESQ.
HOWARD SREBNICK, ESQ.

Court Reporter: Donna W. Dratwa, RMR, CRR

1 THE COURT: Do you want to do it by questions and
2 answers?

3 MS. SANTIAGO: Good morning, Judge. Let me begin
4 by introducing myself -- my name is Sonia Santiago -- and
5 my sister, Sandra Santiago. We are both attorneys, and
6 our offices are located in Bayamon, Puerto Rico.

7 I wrote you a letter dated June 29th of this year
8 on behalf of Dr. Garib. I'd like to have the opportunity
9 to read the letter for the record, if I may.

10 "Dear Judge Fuste,
11 "Let me begin by introducing myself. My name is
12 Sonia Santiago, and I am a practicing attorney
13 with offices in Bayamon, Puerto Rico. It has
14 been brought to my attention that the sentencing
15 date for Dr. Jorge Garib is July 11th of this
16 year. I'd like to take this opportunity to
17 express a few words on behalf of such an
18 extraordinary human being."

19 I also speak for my sister and fellow attorney
20 Sandra Santiago. She's here next to me.

21 I met Dr. Garib many years ago. That was when I
22 referred him a HIV client for treatment.

23 I didn't include in the letter, but at the
24 time, this was a very dear person to me, and I personally
25 took the person to see Dr. Garib. I didn't know him. I

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1 PROCEEDINGS

2 THE COURT: Let's call the case for sentencing.

3 THE CLERK: For sentencing hearing, Criminal
4 97-091, United States of America versus Jorge L. Garib
5 Bazain. On behalf of the government, attorney Maria
6 Dominguez and Edna Rosario. Defense attorneys, Howard
7 Srebnick and Charles Fitzwilliam.

8 THE COURT: I had a short meeting with counsel in
9 chambers, and one of the things that I heard is that the
10 defendant wishes to present some short evidence. I might
11 as well hear that first before we even deal with the
12 different objections, because that may assist me in
13 dealing with some of that.

14 MR. SREBNICK: Very well, Your Honor.

15 Howard Srebnick on behalf of Dr. Garib, who is
16 present before the Court.

17 I know Your Honor has received the letters that we
18 submitted to the Court. Some of the people that wrote
19 letters would also like to have a very brief opportunity
20 to address the Court, if I could.

21 Ms. Santiago, please come forward.

22 THE INTERPRETER: Will you need a translation?

23 MR. SREBNICK: No, it will be in English. And they
24 wrote a letter too, Your Honor.

1 knew about him by the newspapers and those type of
2 things. Even when I was residing in New Jersey, when I
3 was a practicing attorney there, I knew about Dr. Garib.

4 When this person came to my office, he was very
5 sick. I really wanted to make sure that he got the best,
6 so I called Dr. Garib. I set up an appointment, and I
7 took the person with me. That was the first opportunity
8 that I had to meet him.

9 and I'm very nervous today, and I really love
10 him, and I'm very emotional, so you have to excuse me.

11 THE COURT: I understand that fully.

12 A. When I met Dr. Garib, what impressed me the most
13 was his human side.

14 I took him a person who has no financial means.

15 That was not a problem with him. He provided the
16 treatment. He provided not only medical treatment, human
17 care, and he was with that person for many years.

18 After that, I developed a good relationship
19 with him, and my relationship turned into a professional
20 one. I began using Dr. Garib for different cases that I
21 had in my office. On some occasions, I couldn't pay him
22 because my client couldn't pay me. So I couldn't pay
23 Dr. Garib. He never rejected a case. He always was there.

24 I had meetings with him. I had conferences.
25 On a couple of occasions, he wrote expert reports at no

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1 cost, and I explained those instances to you in the
 2 letters. There was one that I didn't include that I'm
 3 including now, and it was a case that was heard in the
 4 courthouse of San Juan. It was a person who was a homeless
 5 individual who was killed in the backyard of a house in Rio
 6 Piedras because the owner decided that he was a thief, so
 7 he killed him.

8 The owner, there was no problem with him. He
 9 never -- no charges were presented against him. So we took
 10 the case, and we -- that was my sister -- we filed an
 11 action against the owner of the house because he killed
 12 this human being. Part of his defense was he was a nobody.
 13 He was sick. He was going to die anyway. "You are asking
 14 for too much money for the family, because this guy, he's
 15 going to die anyway, so what are you talking about?"

16 We needed a person with expertise, who was able
 17 to provide information to the court and explain to the
 18 court that this person, if this person was provided with
 19 medical treatment and other care, he would survive for many
 20 years. We didn't have a person who would do that for free.
 21 Dr. Garib did it. Not only he prepared the report, he came
 22 to court and he testified during an entire morning.

23 We won the case. We never saw any money; we
 24 just got a beautiful judgment against the person who killed
 25 this poor human being. But the fact of the matter is that

1 first physicians who treated HIV or AIDS patients in his
 2 private practice in a professional fashion, with
 3 integrity, and without any reservation back then
 4 regarding the possibility of this disease, the
 5 probability of it being contagious, or whether or not --
 6 knowing whether it could be a communicable disease or
 7 not.

8 We're going back many years, not like the present
 9 time. Right now we know how to prevent it, or at least
 10 what measures to take. And I know for a fact, as a joint
 11 member of the hospital, that he never had any problems to
 12 see to it that his patients be admitted to the hospital,
 13 even when members of our faculties did not want to admit
 14 this on account of the possibility of contamination and
 15 the cost involved in this.

16 I do not feel that anyone who has risked himself in
 17 this way and who risked his family and the doctors whom
 18 he consulted to give these patients the service, the
 19 quality of service that they deserved, could have any
 20 kind of motivation that would be solely financial. Many
 21 times these patients were not able to pay; however, they
 22 received all the services that they deserved at that
 23 time.

24 I feel that these issues should be important and
 25 should be taken into account at this time because I

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1 Dr. Garib was there, and many people don't know that.

2 I know attorneys, judges who had spoken to me,
 3 and they know what he stands for. But they're not here.
 4 But I say you have to do what you think is right.

5 For us, it's right to come here to tell you
 6 that there is nothing wrong with having compassion. There
 7 is nothing wrong for the court to feel compassion and to
 8 see the other side of a person. I know you will, Judge,
 9 and that's why I'm asking you now, on behalf of my sister
 10 and myself and Dr. Garib's family, to show your leniency
 11 and to take into consideration all the things that we're
 12 telling you now that are also included in my letter.

13 Thank you very much.

14 THE COURT: Thank you.

15 MR. SREBNICK: Dr. Lydia Garib.

16 (Witness speaking through an interpreter.)

17 DR. LYDIA GARIB: Good morning, Honorable Judge.
 18 Good morning to everyone present.

19 The reason why I am standing before you and I want
 20 to address you is because I want you to know how I feel
 21 regarding Dr. Garib's integrity as a physician. I know
 22 Dr. Garib not only by virtue of the fact that he's a
 23 relative, but also by virtue of the fact that when we
 24 both started to practice our specialities, we started
 25 together. And I know for a fact that he was among the

1 honestly feel -- and I have lived through this alongside
 2 of him -- that he has practiced medicine in a heartfelt
 3 way, and under the very oath that we take whenever we
 4 become doctors in medicine.

5 That will be all.

6 THE COURT: Thank you.

7 MR. SREBNICK: Mr. Rodriguez Bacalau.

8 (Witness speaking through an interpreter.)

9 A. My name is Raul Rodriguez Bacalau. I'm married,
 10 and I own a residence in Guaynabo, Puerto Rico.

11 As is known throughout -- during recent months,
 12 there was a trial held in which Dr. Garib Bazain was found
 13 guilty, and as a result of this verdict by a jury, he will
 14 be sentenced on May 11th, 2000, in the courtroom belonging
 15 to the honorable judge who presided over the trial.

16 THE INTERPRETER: (Reading letter):

17 "What moves me to write this letter is because I
 18 would like to emphasize that regardless the
 19 merits of the case, I can attest without a doubt
 20 in my mind that Dr. Jorge Garib is a professional
 21 with integrity, and devoted to the cure of AIDS.
 22 and is not a self-serving human being. He is
 23 honest, and that at the beginning of the '80s,
 24 when hardly any doctor in Puerto Rico wanted to
 25 see any people who had AIDS, he would take care

1 of them in his private office.

2 "This that I am saying is not the result of any
3 special request made from a friend. Instead,
4 it's on account of what I was able to observe
5 from the year '88 until just as recently as the
6 year 2000, during which time he was successfully
7 treating a very close relative who was
8 practically -- in a very precarious condition due
9 to his illness, which was AIDS.

10 "This relative, very close to me at this time, is
11 carrying out a successful life. As a matter of
12 fact, he is working at the present time and going
13 to school. Had it not been for the hand of God
14 and the care -- and the not self-serving care
15 given to him by Dr. Garib, that is, the care
16 given by him to this patient, today he would not
17 be enjoying the state of health, the stable state
18 of health which he is in, and improving by the
19 day.

20 "I can also vouch that during the past 12 years,
21 by visiting his office monthly, I can vouch for
22 the many testimonials given by people who suffer
23 from AIDS and who would tell me that Dr. Garib
24 was one of the few doctors who would take care of
25 patients who had this illness, due to the

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1 who would have been willing to come here and
2 testify. This of course did not take place,
3 because AIDS, still to this day, although to a
4 lesser degree, is stigmatized and it is a stigma
5 for the patients who have AIDS, for obvious
6 reasons. And it would be very difficult for
7 these people to come and testify at trial.

8 "I humbly add, with very much respect, pray that
9 this personal history and professional history of
10 Dr. Garib be analyzed and based on all of these
11 above stated, a sentence of probation be afforded
12 to him, because, in my opinion, what would be
13 gained by depriving him of his freedom, if by
14 doing so, you will also be depriving thousands of
15 patients of AIDS, who, with so much love and so
16 much hope of having their life back, have been
17 surviving, thanks to the devotion and dedication
18 that Dr. Garib has carried out to eradicate this
19 disease that has taken so many lives in Puerto
20 Rico and throughout the entire planet."

21 Thanks you very much.

22 THE COURT: Thank you.

23 MR. SREBNICK: The only other witness that I was
24 going to call for purposes of the issues that we have
25 raised in the motion for departure would have been Father

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1 ungrounded stigma that this illness has. And
2 that he would even treat them without charging
3 them for their visit.

4 "Dr. Garib's degree of humaneness that he
5 practiced in his office -- by the way, a very
6 modest practice, while I used to visit him -- I
7 would see there perhaps one or two people at
8 most, and he explained the reason for this to me.
9 And I was able to see for myself the reason,
10 because many times the patients would stop going
11 to his practice because they did not want --
12 because other patients did not want to be
13 confused as patients who had AIDS, and all of
14 this operated to undermine his prestige, for
15 Dr. Garib was also a specialist in internal
16 medicine.

17 "Personally, I was treated by him several times
18 due to stomach problems, and I was always able to
19 observe his demeanor as a true professional,
20 devoted to the well-being of his patients,
21 regardless of his patients's social or financial
22 condition.

23 "I would venture to say with all honesty that the
24 courtroom in which this trial was held would not
25 have been big enough to hold all of the people

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1 Enrique Mendez, who is not able to be here because he
2 himself is ill. And he was able to testify during the
3 trial. I had spoken to him, told him that we decided not
4 to call him as a fact witness at the trial, to have him
5 here today. And he's been hospitalized; he can't be
6 here.

7 I personally spoke to Padre Mendez. I knew him
8 from even before this case, and he had told me that he
9 was one of the first persons that Dr. Garib met when
10 Dr. Garib came here from Cuba when Dr. Garib was 14 or 15
11 years old. And he was almost like a second father to
12 Garib in the one area that I wanted Padre Mendez to talk
13 to the Court about, which I can just proffer is the
14 number of times, measured in double digits, where Padre
15 Mendez would have people come to the church who were
16 indigent, who couldn't afford medical treatment, and he
17 would have that person receive medical treatment from
18 Dr. Garib, pro bono, no charge, for people who simply
19 could not afford medical attention. I'm sorry that Padre
20 Mendez couldn't be here to speak to that, but I can
21 proffer that to the Court.

22 THE COURT: Very well.

23 MR. SREBNICK: That would be all in terms of
24 witnesses. There are some other allocution matters I'll
25 reserve until later.

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1 THE COURT: Let's then deal with the objections.
 2 Let's take them one by one. Let's first start with the
 3 amount of loss.

4 MR. SREBNICK: There is no dispute that the base
 5 offense level was four.

6 THE COURT: I understand. Let's start with the
 7 amount of loss.

8 MR. SREBNICK: The PSI, consistent with the
 9 government's submission, recommends the amount of loss to
 10 reach \$1.23 million, which if the Court were to accept
 11 it, would require a 13-level upward adjustment for
 12 Dr. Garib. We have advanced several reasons why we
 13 believe that overstates the amount of loss attributable
 14 to Dr. Garib.

15 I think the most obvious one is the undisputed fact
 16 that Dr. Garib resigned from the board of directors in
 17 June of 1990. The evidence established a trial that
 18 Dr. Garib did not participate in, and indeed, no one even
 19 testified that he had any knowledge of the -- what I call
 20 the bogus contracts and the bogus offshore corporations
 21 in which Kouri and Corcino were involved.

22 The Court may recall the testimony of Corcino, and
 23 I specifically asked him on cross-examination whether
 24 Dr. Garib had even touched one penny of all that money
 25 that was set up offshore, and Corcino in fact confirmed

1 found that person was responsible for.
 2 I think it's evident from the trial that the
 3 episodes that the jury was asked to focus on during the
 4 government's closing argument, although there were
 5 certainly other matters that the jury was given to
 6 consider, it was obvious what the jury was really asked
 7 to convict Dr. Garib for was for the events that occurred
 8 in 1988, with the events that occurred with Granados, the
 9 camera, the \$60,000 check, the housekeeper, the
 10 secretary. Those were the events that were the heart of
 11 the case against Dr. Garib.

12 The only other event that occurred after 1990 was
 13 the Carlos Diaz Olivo office, where Mr. Corcino claims
 14 that Sotomayor had requested a campaign contribution from
 15 Dubon at the law offices of Mr. Dubon. Put aside all the
 16 hearsay issues, and that there was no evidence that the
 17 money was going to be coming from ACHS, et cetera, it
 18 still doesn't implicate Dr. Garib in the heart of the
 19 bogus corporations.

20 All of the matters that really skyrocketed those
 21 guidelines, Judge, because of the -- and I think it's
 22 somewhere in the neighborhood of \$1 million. If the
 23 Court turns to the loss table that the government
 24 submitted, it's Exhibit B. I think the Court is looking
 25 at it.

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1 that Dr. Garib did not.

2 I went back and looked at the transcripts last
 3 night, Judge. Those bogus corporations didn't start
 4 until 1991. Dr. Garib was removed from the board of
 5 directors in June of 1990. We have submitted to the
 6 Court, post trial, a letter where Dr. Garib wrote his
 7 resignation later, at June, at the latest, of 1990.

8 It's not fair that we saddle Dr. Garib with the
 9 same losses with those who continued to administrate the
 10 affairs of ACHS. Dr. Garib was opposed to turning the
 11 corporation into nonprofit in order to receive federal
 12 grant money. There was no dispute about that. That's
 13 what separated Dr. Kouri from Dr. Garib. Dr. Garib voted
 14 against, rejected, and was opposed to turning non-profit
 15 for the purpose of receiving federal grant monies.

16 So the irony is that had Dr. Garib's position been
 17 accepted at ACHS, there would have been no federal grant
 18 monies, because federal grants monies only became
 19 available once the corporation was converted to nonprofit
 20 after Dr. Garib left.

21 So that is my first argument in terms of divvying
 22 up the amount of money. We'll get to the issue of the
 23 monies while the corporation was for-profit, but I think
 24 just as a matter of fairness and equity in treating
 25 somebody, holding them responsible for what the jury

1 THE COURT: I have it here before me.

2 MR. SREBNICK: If you look at the first five
 3 episodes, Fundacion, Medservices, Professional Resources,
 4 suppliers involving Julio Corcino, suppliers involving
 5 Angel Corcino, those events simply occurred after
 6 Dr. Garib was outside the administration of ACHS, and no
 7 one ever testified that he was even at the offices of
 8 ACHS, was consulted, was talked to about any of these
 9 events. So just as an initial matter, I would ask the
 10 Court not to include those and aggravating Dr. Garib's
 11 sentence.

12 THE COURT: Let me hear the government on that
 13 particular issue. What I have for you, Ms. Dominguez, is
 14 the following question. Assuming that he did resign in
 15 June of 1990 from the board of directors, and taking into
 16 consideration the fact that you have a number of items on
 17 the table that go beyond that date, starting with the
 18 suppliers, Professional Resources, Medservices and
 19 fundacion, why is it that we should then include those
 20 amounts in Dr. Garib's loss for purposes of guideline
 21 calculation?

22 MS. DOMINGUEZ: Yes, sir. First of all, Judge, I
 23 would begin by just noting --

24 THE COURT: Before you continue, I'm assuming he
 25 did not withdraw from the conspiracy, because obviously,

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1 that is something that we have to assume.
 2 What is there in this record that makes him
 3 surface, if you will?
 4 MS. DOMINGUEZ: First of all, I would begin by just
 5 noting for the Court the very solemn principle that there
 6 is vicarious responsibility in a conspiracy, that
 7 coconspirators are each responsible for the conduct of
 8 their cohorts in the illegal enterprise. And I think,
 9 Judge, in this case, this was exemplified by the evidence
 10 that everyone had a different role, and even though one
 11 particular defendant may not have been specifically
 12 involved, for example, in the bogus corporations which
 13 really effects, and the offshore bank accounts that
 14 really effects the laundering of the illegal proceeds,
 15 but not necessarily the diversion, that they were still
 16 aware and benefited from, and gave instructions
 17 consistent with the use of that money.

18 Let me give the Court specific examples. I believe
 19 that with respect to the specific issue that the Court
 20 has raised in terms of Dr. Garib being responsible for
 21 losses incurred after he left ACHS, he resigned from the
 22 board of directors in June of 1990, and he left ACHS as
 23 medical director and severed his ties with ACHS, at least
 24 formally, in June of 1992. And I say formally, Judge,
 25 very deliberately, because the Court will recall, and I

1 internally corroborated by the facts of the case, because
 2 that is what the amount of the donation actually was.
 3 And Mr. Corcino testified that sometime later
 4 during the meeting, the infamous meeting which took place
 5 at Dr. Kouri's apartment in Isla Verde where the cash is
 6 actually turned over to Mr. Diaz Olivo, that Kouri asks
 7 him to give \$15,000 in cash. And Corcino testified that
 8 this money was coming from the schemes that were in place
 9 to divert money: Fundacion Panamericana, Medservices,
 10 the bogus checks.

11 I don't think that it is necessary, and that the
 12 law imposes a responsibility on us to prove that
 13 Dr. Garib actually signed contracts then actually went
 14 and opened accounts or had specific knowledge with
 15 respect to the details of how the money was going to be
 16 laundered. It is clear that he was still involving
 17 himself in the illegal objects of this conspiracy, and he
 18 was still consulting with coconspirators and acting in
 19 concert with them. And that is a conspiracy.

20 Now, Mr. Srebnick would probably have the Court
 21 disregard that testimony because it is hearsay. It is
 22 not hearsay, it is a statement of a coconspirator. And
 23 Judge, I would suggest to this Court that there is
 24 corroboration in the sense that this testimony from Angel
 25 Corcino rings true. And I will tell the Court why.

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1 will cite specific examples, that there was evidence
 2 presented at trial that even after he had formally
 3 resigned these positions, Dr. Garib was still involved in
 4 this illegal conspiracy.

5 THE COURT: Tell me, how is that so?

6 MS. DOMINGUEZ: Number one, the Court will recall
 7 that towards the elections of 1992, in the fall of 1992,
 8 Dr. Garib is implicated as being involved in a meeting
 9 participated in a meeting that was held at Mr. Dubon's
 10 law offices. At that meeting, Mr. Dubon, Dr. Garib, and
 11 Ms. Sotomayor were present, together with Dr. Kouri. And
 12 at that meeting, the evidence at trial was, Judge, that
 13 Dr. Garib solicits a \$25,000 contribution for Mr. Diaz
 14 Olivo; that act occurred, Judge, after he has left ACHS,
 15 for all intents and purposes. And you have him
 16 participating in a meeting with other coconspirators,
 17 continuing to execute the illegal purposes of this
 18 conspiracy.

19 If the Court will recall, subsequently
 20 Ms. Sotomayor tells Mr. Corcino, after she exits from the
 21 room, "This petition was made by Dr. Garib. We need to
 22 get this money." Mr. Corcino later testified that
 23 although the donation was \$25,000, that is the amount
 24 that Ms. Sotomayor relates to him that was requested by
 25 Dr. Garib." And in fact, Judge, I think that that is

1 Even though Dr. Garib appeared before the grand
 2 jury in February of 1999 and took an oath to tell the
 3 truth, he did not blanket denial that he had any
 4 involvement with any political campaigns even though the
 5 evidence was that he met with Granados, that he gave
 6 money to Granados, and that he petitioned for a political
 7 contribution for Diaz Olivo.

8 Now, Judge, why would that ring true? And I would
 9 point the Court to the testimony of Edwin Mundo, who sat
 10 before this Court and told you that it was Dr. Garib who
 11 was sent to collect money for a telemarathon for Diaz
 12 Olivo, and there was also testimony, Judge, that
 13 Dr. Garib, the man who denied having any involvement in
 14 politics, was also participating in a committee meeting
 15 in the campaign for Diaz Olivo.

16 How is it, Judge, that --

17 THE COURT: We're talking in terms of 1992?

18 MS. DOMINGUEZ: Correct; in 1992.

19 Now, Judge, is it just a coincidence that Corcino
 20 would just make up that it was Garib who made this
 21 petition for the \$25,000, or that Sotomayor would make
 22 this up?

23 And then you have corroboration from independent
 24 sources that have no direct involvement in the case,
 25 that, in fact, Dr. Garib was involved with the finances

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1 of Diaz, and in fact was on the finance committee. I
 2 think that, Judge, that is powerful evidence, and I think
 3 that it lends credence to the proposition that Dr. Garib
 4 did not, even in the legal sense, withdraw, but never
 5 realized his participation in the conspiracy. Because I
 6 think the law is very clear that even if you withdraw in
 7 the layman's sense, you haven't been withdrawn in the
 8 legal sense, in the sense that it would rise to the level
 9 of a defense, unless you denounce the activity.

10 You can't just simply put wheels in motion, leave
 11 them turning, leave the mechanisms in place that we're
 12 diverting hundreds of thousands of dollars from the
 13 institute, and simply absolve yourself from the
 14 responsibility for the continued conduct. But even
 15 beyond that, I think the evidence is clear that Dr. Garib
 16 did not withdraw in that way, that he continued to
 17 consult with coconspirators, and that in spite of the
 18 fact that there has been much made of the fact that he
 19 and Kouri have some disagreements, that he still
 20 consulted with him, that they still met, and still made
 21 decisions in concert.

22 Fundacion Panamericana, Medservices, and
 23 Professional Resources, all of those began in 1991.
 24 Fundacion Panamericana concluded in 1993, Medservices in
 25 1993, and Professional Resources in 1992. And while,

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1 I think the case is controlled by two precedents not in
 2 this circuit. The case, Schorovsky, cited; and another
 3 case after the government's response, United States
 4 versus Ladum, L-A-D-U-M, 141, F.3d at 1328, where the
 5 defendant did exactly what the government is arguing: He
 6 was involved, stepped away, and then reinserted himself.

7 And that case was remanded for resentencing because
 8 the Judge had held him responsible for everything, and
 9 the Court of Appeals says you have to do a more specific
 10 analysis, and you can't hold him responsible for events
 11 when he wasn't there, unless the government can show that
 12 they were jointly undertaken, reasonably foreseeable.
 13 And in that case, as in this case, the corporations
 14 didn't even exist. And Dr. Garib opposed the receiving
 15 of federal grants. It just seems, to me, totally out of
 16 the ordinary.

17 THE COURT: Opposing federal grants cuts both ways.
 18 MR. SREBNICK: How so?

19 THE COURT: I don't want federal grants. Because
 20 of all of the money, I'm going to get in trouble for
 21 that.

22 MR. SREBNICK: He wanted this to be a private
 23 business, not to be a nonprofit, which would have
 24 eliminated any federal grants. This whole case is about
 25 federal monies being stolen by ACHS, supposedly.

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1 yes, I would concede that some of the losses were
 2 incurred after Dr. Garib left, I think that it is clear,
 3 Judge, that it was clear that mechanisms were in place
 4 for diverting money, and he cannot claim that those
 5 losses were not reasonably foreseeable to them and he did
 6 nothing to stop it.

7 THE COURT: When we were discussing this, let me
 8 just -- when we were discussing this, I thought in terms
 9 of relevant conduct and Guideline Section 1B1.3, which
 10 gives us the answer to many of these questions. And if
 11 you take a look at that, a defendant in the position of
 12 Dr. Garib would be responsible, in the case of jointly
 13 undertaken criminal activity, under a plan, or
 14 conspiracy, whatever it may be, for all reasonably
 15 foreseeable acts and omissions, even of others, in
 16 furtherance of the jointly undertaken criminal activity.

17 And the reason I asked whether he surfaces, if you
 18 will, after his resignation to the board of directors is
 19 to see whether he indeed went home and totally
 20 disconnected himself, although he may not have withdrawn,
 21 and whether indeed there were other corroborations about
 22 the fact that the wheels in motion that Ms. Dominguez
 23 refers to were still running, and that he was responsible
 24 for those.

25 MR. SREBNICK: I understand the Court's question.

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1 Dr. Garib was opposed to receiving federal monies. He
 2 was opposed to nonprofit. He wanted this to be private,
 3 free enterprise.

4 Now, we'll get to that issue in a moment, but I
 5 don't know how the government then distinguishes the
 6 sentences that this court meted out to Borel and Burgos,
 7 when Fundacion, Medservices, and all of these
 8 corporations were ongoing, and yet the Court limited
 9 their relevant conduct to the events of which they were
 10 directly involved, if we're going to apply some sort of
 11 consistent principle here. Those individuals would have
 12 then had to have been sentenced for the entire scope of
 13 those bogus corporations, since they were actually still
 14 integrally involved in the conspiracy, when those events
 15 were occurring. It just strikes me as completely unfair
 16 to Dr. Garib, who has left the affairs of ACHS, who
 17 doesn't, quote, benefit. I think that was the word that
 18 Ms. Dominguez used.

19 What benefit did Dr. Garib derive from those
 20 so-called diversions when his salary was cut? All he was
 21 doing was making \$2,000, I believe, a month as a
 22 consultant, to provide medical treatment. He stood
 23 nothing to gain from all of these diversions. I'd like
 24 to correct --

25 THE COURT: Don't you think that one could also

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1 argue that somebody gets involved in this, not for money,
 2 necessarily? It's for the power that this gives you.
 3 MR. SREBNICK: Dr. Garib left. What power did he
 4 have?

5 THE COURT: In 1990 when he surfaces, and he's
 6 collecting money for Diaz Olivo in the context of what we
 7 know happened in this case, he becomes a very powerful
 8 figure politically, when you are controlling, up to a
 9 certain point, and giving money to candidates, who in
 10 turn may give you favors in the future.

11 MR. SREBNICK: Let me make clear, the evidence on
 12 that was the double hearsay testimony of Corcino, which
 13 we don't accept.

14 I would also like to clarify that Dr. Garib, in
 15 his grand jury testimony, never denied that he was
 16 involved in fundraising, buying tickets. His name was
 17 right on the Diaz contribution list of having had a
 18 cocktail at his home. So I think the government
 19 overstates what Dr. Garib's testimony was.

20 But even so, Dr. Garib approaching Mr. Dubon, if
 21 you accept the testimony, which we obviously don't
 22 accept, but even if you have to accept it, based upon the
 23 evidence, if the Court is going to credit Corcino's
 24 hearsay of what Sotomayor said, that is totally
 25 inconsistent, I should add, with the evidence that the

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1 confirmation that he indeed continued to participate
 2 informally, not as a board member. And under those
 3 circumstances, I do think that the losses, specifically
 4 the ones that started accruing in 1991, through the whole
 5 year, 1992, and up to early 1993, are attributable to him
 6 under 1B1.3. So therefore, I don't intend to change the
 7 amount. It will be 1,231,835.

8 MR. SREBNICK: May I just address the other points.

9 THE COURT: Let's go to the other objection.

10 MR. SREBNICK: As to the amount of loss, we also
 11 raise other issues. And I know the Court seems to have
 12 ruled, but I'd like to just preserve those, as I must, to
 13 appeal them.

14 THE COURT: They are preserved by the mere fact
 15 that you filed your very detailed motion, and I have
 16 considered them; believe me, I have.

17 MR. SREBNICK: Since I'm not familiar with the
 18 procedures here -- we have to restate all our objections
 19 in the Eleventh Circuit.

20 THE COURT: I'm accepting what you wrote in the
 21 paper, which I did consider.

22 MR. SREBNICK: So those are preserved for appellate
 23 purposes?

24 THE COURT: Exactly. Let's go to the second
 25 objection.

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1 MR. SREBNICK: Role in the offense.

2 THE COURT: Yes.

3 MR. SREBNICK: Again, I know the Court treats each
 4 person, not having to justify one sentence for the other,
 5 as the Court just articulated, but I do think when it
 6 comes to role in the offense, the whole role of the
 7 offense is to compare one person's role in a conspiracy
 8 with that of his alleged coconspirators. And I know that
 9 the Court resolved the issue as to Ms. Sotomayor, finding
 10 no role adjustment. She was involved, according to the
 11 government's position, throughout the entire episode as
 12 the manager, the person who had, next to Kouri, the most
 13 authority.

14 THE COURT: Give me one minute. Let me take a look
 15 at something in the presentence report on that issue.

16 MR. SREBNICK: I cited the general case law, and
 17 I'm trying to explain -- explain it, really, in this
 18 limited area. The Court typically does a comparison of
 19 one defendant's role to the other in order to sort of
 20 develop the hierarchy.

21 And particularly if the Court is going to hold
 22 Dr. Garib responsible for the entire losses, particularly
 23 those during the three or four years when Dr. Garib --
 24 his involvement was -- if the Court makes that finding as
 25 to Diaz, was one episode in 1992, it just seems that the

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1 Court heard about the Antonio's restaurant, where the
 2 idea of soliciting money for the Diaz campaign
 3 originated. It had nothing to do with Garib.

4 But even if the Court is going to resolve that
 5 inconsistent testimony and say that Dr. Garib had
 6 something to do with the fundraising in 1992 when he goes
 7 to Mr. Dubon's private law office, if he solicits, if the
 8 Court accepts this private contribution, what does this
 9 have to do with the monies that Corcino and Kouri were
 10 diverting through offshore corporations? And if the
 11 Court is going to use that analysis, then how does the
 12 Court reconcile that analysis with Borel and Burgos, who
 13 were present, working at ACHS when all of these
 14 diversions, when that was going on, and yet the Court
 15 showed some difference in their sentences in not holding
 16 them responsible for everything that was going on while
 17 they were present, as the court held Sotomayor and Kouri,
 18 who were actively involved.

19 THE COURT: I don't think I have to justify the
 20 sentencing I imposed in the other cases. Let's deal
 21 with this one. The finding I'm making after having heard
 22 the two of you is that the participation that your client
 23 had in 1992, and his getting involved in political
 24 donations with monies that he reasonably could foresee
 25 were coming out of this operation, is the best

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1 fair thing to do would be to not to give him a role
 2 adjustment upward, particularly in comparison with
 3 Ms. Sotomayor, who was involved, as the Court I think
 4 said in its sentencing, as I read the transcript,
 5 involved the day-to-day management and the affair, and
 6 the one who was cutting the checks and involved directly
 7 in checks to Medservices, et cetera.

8 So it just strikes me as, under the guidelines, I
 9 think the Court should consider the relative roles of
 10 each individual and the length of their involvement, and
 11 how direct their involvement was. I do not think it
 12 would be right to give Dr. Garib a greater role than that
 13 of Ms. Sotomayor.

14 THE COURT: Very well. And then, government, why
 15 three levels? Why not two levels or why not four levels?
 16 I want to know what is the government's position, or why
 17 zero levels? It seems to me that we need to further look
 18 into this matter of aggravated role here.

19 MS. DOMINGUEZ: Yes, Judge. Sometimes it is
 20 difficult to specifically pigeonhole the defendant's
 21 conduct, or a particular defendant's conduct, in either
 22 one of the three categories. I think three levels is
 23 appropriate because it is somewhere in the middle.

24 Dr. Kouri, I believe, exercised more control and a
 25 greater leadership role than Dr. Garib, so I don't think

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1 it would be intellectually honest to put him at the same
 2 level with Dr. Kouri.

3 I believe that Dr. Garib deserves some role
 4 adjustment -- whether the Court considers two or three to
 5 be appropriate -- because I think that the evidence that
 6 was adduce at trial, Judge, clearly falls within the
 7 ambit of the sentencing guidelines, where it says that
 8 the Court is to consider the exercise of the
 9 decision-making authority, the nature of the
 10 participation in the committing of the offense, the
 11 recruitment of accomplices, the claim to a right to the
 12 larger fruits of crime, or the degree in participation
 13 and planning.

14 I think that this judge needs to consider that
 15 criteria in the context of the evidence that was
 16 presented in trial. Let me give the Court just one
 17 example.

18 In 1988, just a few months after ACHS had been
 19 formed and the AIDS institute was in operation, you have
 20 Dr. Garib, who is one of the founders, meeting with the
 21 operations manager and the comptroller of the
 22 corporation. And they meet with an individual by the
 23 name of Tony Fernandez.

24 At that time, Judge, there was an approach, an
 25 attempt to induce, to persuade Mr. Fernandez to falsely

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1 endorse the \$60,000 check and thereby provide substantial
 2 funds that the corporation could use for purposes that it
 3 did not want documented. That was what we said at the
 4 time.

5 I think that the evidence has clearly shown what
 6 those purposes were. It should not be lost upon the
 7 Court that this is about the same time, Judge, that there
 8 are also illegal political contributions being paid to
 9 Granados. There were approximately \$200,000 in cash that
 10 were given to him right around the same time, and
 11 although we have not asked the Court to consider that
 12 loss for purposes of sentencing, because there is no hard
 13 and fast proof that those funds came from the institute,
 14 I would suggest to the Court that there is pretty
 15 credible circumstantial evidence to suggest that that
 16 money, those \$60,000, were going to be diverted for some
 17 purpose that is not legitimate.

18 In essence, Judge, what Dr. Garib is doing, is two
 19 very important things that I think the Court needs to
 20 consider in the context of making this decision on role.
 21 Number one, he's setting into motion, Judge, a mechanism
 22 for diverting funds that was used for the next six years
 23 at ACHS. That is, nominee checks, making checks payable
 24 to one person, when in fact that person isn't getting the
 25 money. In this case, it was a legitimate contractor of

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1 the institute, such as it was done with many legitimate
 2 suppliers, contractors, employees of the institute.

3 In other cases, it was people that never rendered
 4 any services for the institute. But this is being done
 5 in 1988 at the behest of Dr. Garib, one of the founders
 6 of the Institute. And Mr. Fernandez testified that all
 7 three were participating in the meeting, but it was
 8 Dr. Garib who took the leadership role, who was doing
 9 most of the talking. He was driving the conversation,
 10 and I think that in essence they're trying to recruit
 11 Tony Fernandez as an accomplice.

12 That is the second thing that was being done,
 13 because once Tony Fernandez agreed to do that, he would
 14 himself be participating in the conspiracy. And I think
 15 that, if the Court looks at the conduct of two other
 16 individuals who were intimately involved with this
 17 conspiracy, both Angel Corcino and Jeannette Sotomayor,
 18 they have taken a back seat to Dr. Garib in this meeting.

19 The other fact that was introduced at trial which I
 20 think that the Court needs to consider, Dr. Garib is the
 21 one that meets with Dr. Kouri and makes the introduction
 22 with Jos Granados Navarro. It's not Jeannette
 23 Sotomayor. At the meeting at Dubon's office, the
 24 evidence is that it was Garib who petitioned for \$25,000,
 25 and then Jeannette Sotomayor gives the order to Angel

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1 Corcino.

2 I cannot deny, Judge, that it is absolutely crystal
 3 clear that Jeannette Sotomayor was the person who was
 4 most involved with the day-to-day operations of the
 5 institute. I think, without mitigating her conduct or
 6 justifying it at all, that in most cases, the testimony
 7 was that Kouri called her and gave her instructions over
 8 the phone.

9 THE COURT: She followed instructions.

10 MS. DOMINGUEZ: She followed instructions, and she
 11 made sure that those instructions were implemented. She
 12 gave instructions to Corcino, because Kouri gave her
 13 instructions.

14 I think that, Judge, if we are to fairly look at
 15 the case, Dr. Garib's position I think is somewhat
 16 different than them. I don't believe that he is just
 17 taking orders from Dr. Kouri, although I would not put
 18 him at the same level as Dr. Kouri.

19 MR. SREBNICK: I think when we're considering role,
 20 I think we should consider the people who aren't before
 21 the Court. Let's talk about the people who actually got
 22 the money. Let's talk about, according to the evidence,
 23 the former mayor of San Juan, Acevedo, who was making
 24 \$5,000 a month off this scheme. Let's talk about Freddie
 25 Borras, who was making \$5,000 a month. Let's talk about

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1 all of the people who were the recipients of the money.
 2 Let's talk about, if we accept the testimony of Granados
 3 and if we put it in the larger scheme of things, and if
 4 we include -- I know the Court is not giving Dr. Garib
 5 any credit for trying in 1992, when he opposed the
 6 change -- it just, as a matter of fairness, and applying
 7 the role offense guideline as the Court, I think
 8 understands, according to the law, it's a relative
 9 comparison.

10 If Sotomayor, who stayed involved day to day, who
 11 recruited someone to commit perjury on her behalf before
 12 the grand jury, who was involved in the very same meeting
 13 that the government is making mention of with regard to
 14 Tony Fernandez, if you accept his testimony, it would be
 15 very hard to distinguish why Sotomayor, even if the Court
 16 says, "Well, she was just following instruction" --
 17 certainly that may be the way it started, but certainly
 18 not the way this conspiracy ended -- and if we are fair
 19 to the facts, if the Court is accepting the government's
 20 version, there is no doubt by the time Dr. Garib resigns
 21 from the board of directors, Sotomayor is no longer just
 22 a direction follower, but she is involved integrally in
 23 the day-to-day affairs, not only in the legitimate
 24 aspects of the institute, but in the illegitimate aspects
 25 of the nonprofit enterprise that was diverting federal

1 funds.

2 And even if it was Dr. Kouri, when Jeannette
 3 Sotomayor was -- it just seems to me that if the
 4 government did not object to the Court's conclusion, that
 5 Sotomayor should get a zero for the role of the offense.
 6 It's just -- it just seems like we're piling it on top of
 7 Dr. Garib without any sense of comparison, without
 8 considering -- I don't know what Corcino's role is going
 9 to be in the offense when he gets sentenced, but these
 10 were people that were equally involved. If we accept the
 11 testimony, as Dr. Garib, at that point -- just seems that
 12 we are just piling it on to Dr. Garib. I don't know why
 13 the government --

14 THE COURT: I said before that I don't have to
 15 explain the sentences of Sotomayor, but I will tell you
 16 one thing. I think that Sotomayor was a blind follower,
 17 blind follower of Kouri. To make it extreme, if Kouri
 18 would have said, "Jeannette, you have to jump out of that
 19 window because it's in the best interest of this whole
 20 thing," she would have done it.

21 MR. SREBNICK: It may be so.

22 THE COURT: Blind follower.

23 In your case, you have an individual who even
 24 though he resigns from the board of directors in 1990,
 25 surfaces in a very strange way in 1992 again, in a way

1 where he has discretion, where he's wheeling and dealing,
 2 he's touching people, he's talking to people, he's
 3 raising money, money that a reasonable person would have
 4 thought came from illegal funding.

5 Had he stayed home dealing with his patients in
 6 1990, and never come back until he was indicted for
 7 whatever happened before, it would have been a different
 8 case, but that's not what we have here.

9 MR. SREBNICK: My problem is that since -- there is
 10 such a conflict in the testimony where someone came from
 11 Antonio's, and Corcino said he heard that it was Garib's
 12 idea. And we don't accept that testimony.

13 THE COURT: I have to make my own decisions here,
 14 and I do find, I do find that indeed he was involved in
 15 this issue in 1992, and I do think that a role -- an
 16 adjustment for role in the offense should be made. But
 17 I'm going to give him the benefit of the doubt. I'm
 18 going to reduce it two levels for the same reasons that
 19 appear in the presentence report, but I'm going to reduce
 20 two levels.

72 1362
21 Let's go to the other one.

22 MR. SREBNICK: Abuse of trust.

23 THE COURT: Yes.

24 MR. SREBNICK: I believe that's paragraph 76 of the

25 PSI, page 30.

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1 On point, I've cited a case which seems to be
 2 squarely on all four, United States versus Garrison.

3 THE COURT: That's the Eleventh Circuit case?

4 MR. SREBNICK: I believe so. It's a case that
 5 deals with this issue. If I could have found a First
 6 Circuit case, I would have gladly cited it.

7 We have a unanimous opinion by the Eleventh
 8 Circuit, and it was followed by another circuit. If the
 9 Court will give me just one moment -- it's followed --
 10 another Eleventh Circuit panel. And there's a Sixth
 11 Circuit case, Ragland, and there's another Moored out of
 12 the Sixth Circuit, so we have two circuits that are very
 13 concerned about the overapplication of the abuse of
 14 trust.

15 I think that the one issue we really have no debate
 16 about, even if we hold Dr. Garib responsible for role,
 17 that we hold Dr. Garib responsible for every deal that
 18 was made, vis-a-vis the federal government's position,
 19 Dr. Garib had no position whatsoever with the federal
 20 government. He had no contact with the federal
 21 government. He made no applications for -- he did
 22 nothing vis-a-vis the alleged victim under this case.

23 Under the Garrison case, where the defendant in the
 24 Garrison was personally submitting fraudulent Medicare
 25 reimbursement requests, personally asking the federal

1 from my client, the 90-year-old sick woman who's counting
 2 on me to prepare her will, and I prepare her will to give
 3 all of the money to my son and have her sign it, well, I
 4 can understand I'm in a position of trust vis-a-vis the
 5 victim. Or if I'm preparing false documents, submitting
 6 them to the federal government, even in that limited
 7 case, according to the Garrison case, that might not even
 8 be enough.

9 THE COURT: What about the guideline itself and the
 10 application notes, 3B1.3?

11 MR. SREBNICK: I believe that Garrison applies
 12 those notes. I don't think they disregarded those notes.
 13 Is there something in particular that -- there are no
 14 cases that say to the contrary.

15 Let's leave it at that. I haven't seen a case
 16 cited by the Court that says that the abuse of trust in
 17 this type of relationship between the victim and the
 18 defendant would qualify for an abuse of trust.

19 I should also note that Dr. Borel, a doctor who was
 20 there when there were federal grants --

21 THE COURT: He was not a physician. They used to
 22 call him Dr. Borel, but it's like --

23 MR. SREBNICK: He was there when these federal
 24 grants were being requested. He did not receive an abuse
 25 of trust.

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1 government to give Garrison federal funds which were
 2 defrauding the government; even there, that does not
 3 satisfy the abuse of trust enhancement. And again, if --
 4 it would be one thing if Dr. Garib was at ACHS making the
 5 applications for the federal grants. Even that, under
 6 Garrison, might not qualify. But it just seems
 7 completely distant from the Garrison facts to hold
 8 Dr. Garib responsible, particularly when he was not in
 9 favor of asking for federal dollars.

10 And what's important about Garrison is that the
 11 court, according to that case and the other cases that
 12 Garrison relies upon, looks to the position that the
 13 defendant occupies vis-a-vis the alleged victim. And if
 14 the alleged victim is the federal government, Dr. Garib
 15 never had one iota of contact, not one signature of his
 16 asking for federal money. He never asked for one federal
 17 dollar.

18 THE COURT: Is that the determinant factor? Is
 19 that what really determines it?

20 MR. SREBNICK: I believe under Garrison, Mills, and
 21 Moored, and the cases that they relied upon, what
 22 determines it is did Dr. Garib occupy a special
 23 relationship between himself and the victim, the federal
 24 government.

25 Just as I was a lawyer and I'm embezzling money

1 THE COURT: Dr. Borel was by no means in the same
 2 position as your client.

3 MR. SREBNICK: Understood. But he was there when
 4 federal grants were being requested, and Dr. Garib, even
 5 by the Court's own finding, may not have been there,
 6 although he's being held responsible. So again, it just
 7 seems that this is not the appropriate place to aggravate
 8 Dr. Garib's sentence.

9 THE COURT: I understand. Let me hear the
 10 government on this issue.

11 MS. ROSARIO: In this case, I think that the case
 12 that the defense cites as Garrison is not applicable, or
 13 even to be applied to the particular case that we have at
 14 hand. In Garrison, the issue was that it was solely a
 15 Medicare provider, and he would just submit the bills to
 16 them to be paid.

17 In this case, ACHS was entrusted with the receipt
 18 of funds, of federal funds that were then to be used for
 19 the treatment and care of AIDS patients. The defendant
 20 Dr. Garib held a position of trust at ACHS as a member of
 21 the board and one of the persons who helped organize ACHS
 22 in order to pursue the program for which it was
 23 organized, the care and treatment of AIDS patients.

24 Now, I don't think that the evidence in this case
 25 was that Dr. Garib was against the receipt of federal

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1 funds. I think that the evidence presented by the
 2 defense was that Dr. Garib was against the idea of ACHS
 3 becoming a not-for-profit organization, and the purpose
 4 of it becoming a not-for-profit organization was for it
 5 to then receive additional funds. And these would be the
 6 federal funds that it received through 1990 up to 1994.

7 THE COURT: Once again, what is the difference
 8 between the facts in Garrison and the facts in this case
 9 that may have prompted the Eleventh Circuit to decide
 10 what they did decide?

11 MS. ROSARIO: In our case and in the AIDS Institute
 12 case, ACHS did more than simply bill for the services it
 13 provided for them to get reimbursement from a federal
 14 program. In our case, ACHS, through federal grants and
 15 other federal programs, received not only directly, but
 16 also indirectly, federal funds for the functioning of the
 17 AIDS Institute of San Juan. And those federal funds were
 18 intended for a specific purpose, as outlined in the grant
 19 awards that they received.

20 Now, whether or not at some point the funds were
 21 received directly from ACHS, or the funds were given
 22 through a contract either by the Municipality of San
 23 Juan, or through the State Department of Puerto Rico or
 24 any other state governmental organization, such as the
 25 services against drug addiction, those federal funds that

1 operator. She was a businesswoman, and she was the owner
 2 of this Health Master Home Health Care, Inc., which
 3 provided home nursing care for patients.

4 What she basically did was overbilled. That's what
 5 she does, overbilled, overbilled to Aetna Life Insurance
 6 and Casualty Company. That was the intermediary, the
 7 insurance company that was dealing with the Department of
 8 Health and Human Service. She would bill the charges.
 9 She would be paid for this overbilling, and that's how
 10 eventually she ends up in this whole situation.

11 The question is whether a person in the shoes of
 12 your client is closer by definition to Garrison, to
 13 Jeanette Garrison, or to this particular description here
 14 that the case makes in reference to 3B1.3, which is was
 15 he, as a member of the board of directors with more
 16 freedom to commit or to conceal a difficult-to-detect
 17 wrong, and if he was, then the adjustment must be given
 18 to him. Was this some sort of fiduciary, if you will, to
 19 the large assignments of federal funds to the agency.

20 MR. SREBNICK: I think the answer is certainly,
 21 until June of 1990, there were no requests to the federal
 22 government for any money. And the money that came to
 23 ACHS under the government's own theory, until 1991, was
 24 all funding that the municipality had received from the
 25 federal money, which the municipality then used some to

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1 were ultimately received by ACHS were for an intended
 2 purpose, for the treatment and care of those AIDS
 3 patients, and Dr. Garib was in a position of trust as a
 4 member of that board, that those funds were to be used
 5 for that intended purpose, not for any other purpose.

6 THE COURT: Let me ask you something. Do you have
 7 a copy of the Garrison case? I had one, and I just left
 8 it inside. I don't find it. I thought I had it right
 9 here. I want to take a look at it again.

10 MS. ROSARIO: No, I don't.

11 THE COURT: Perhaps Mr. Srebnick has it.
 12 (Document handed to Court.)

13 THE COURT: Do you have a real copy of this case?
 14 I can't read this informally. I think I'll find it. I
 15 think I'll have it. Let me just look for it again.

16 I found it.

17 I would say that even under the Garrison case, you
 18 have to think in terms of this: The purpose of 3B1.3 is
 19 to penalize a defendant who takes advantage of a position
 20 that provides him freedom to commit or to conceal a
 21 difficult-to-detect wrong, and only such a defendant
 22 whose position enables or significantly facilitates the
 23 offense is eligible for the same enhancement.

24 In other words, in the case of this woman, Jeanette
 25 Garrison, she was a registered nurse who was actually the

1 meet their contract obligation to ACHS.

2 So after 1990, Dr. Garib occupies no position of
 3 trust. We know that, that's undisputed. Prior to 1990,
 4 Dr. Garib's -- ACHS is not.

5 THE COURT: He's medical director.

6 MR. SREBNICK: No, June of '90, he continues
 7 working as a consultant, but he gives up the position of
 8 medical director. He gives up the position on the board.
 9 He's making I believe \$2,000 a month treating patients,
 10 period, June of '90, and the federal grant money is
 11 received in 1991, so that up until 1990, his position on
 12 the board is not a position that assists him in taking
 13 money from the federal government, if the Court is going
 14 to use the analysis there, because there were no requests
 15 made of the federal government for any money.

16 It turns out that the municipality was being given
 17 federal money, which the municipality was using to make
 18 its payments under the contracts to ACHS, but no federal
 19 grant money while Dr. Garib was on the board of directors
 20 of ACHS.

21 THE COURT: Government.

22 MS. DOMINGUEZ: I would just like to correct a
 23 misstatement. Did he resign his position as medical
 24 director in 1992?

25 MR. SREBNICK: I think it was another medical

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1 director, either Unda or one of the others, who took over
 2 Dr. Garib's level of June of 1990. Specifically, he
 3 resigns. He gives it up. Jaime Rivera Due o, the Court
 4 recalls the testimony, cut Dr. Garib's salary in June of
 5 1990, and Dr. Garib leaves. And it just may be a mistake
 6 of memory, but I know without any doubt in my memory that
 7 in June of 1990 -- and I'll produce the letter if the
 8 Court gives me one minute.

9 MS. ROSARIO: I don't think Roberto Unda ever held
 10 position of medical director. I think at that time there
 11 were meetings, and there's evidence that came out in the
 12 first trial, in Dr. Kouri's apartment in Isla Verde
 13 whereby several doctors who already worked at ACHS, I
 14 think it was Dr. Jorge Santana and Dr. Marisol
 15 Martinez -- visited at the apartment and were interviewed
 16 for the possibility of occupying the office of medical
 17 director, but Dr. Unda was never in that position.

18 MR. SREBNICK: It was Dr. Santana that took over
 19 from Dr. Garib, but it was in 1990. And I'll get the
 20 letter.

21 MS. ROSARIO: We again would submit that
 22 Dr. Garib's position was one of fiduciary duty, as being
 23 a member of the board, and he well knew that ACHS was
 24 going to receive federal funds, and that federal funds
 25 had already been committed to ACHS in 1988, although the

1 '91, addressed to Dr. Garib. And Dr. Garib's title was
 2 (spoke in Spanish) that he was a consultant and not the
 3 director. And the testimony of Jaime Rivera Due o, the
 4 Court will recall when they produced that Dr. Garib take
 5 a 50 percent pay cut, Dr. Garib resigned, both from the
 6 board and from the medical director position.

7 THE COURT: He resigned effective July the 1st,
 8 1990.

9 MR. SREBNICK: And the federal grant money was not
 10 received, according to Mr. Poole's testimony, until 1991.

11 THE COURT: Let's reargue the issue on the basis of
 12 the hard evidence, which is the letter. You already did.
 13 Government, why then should we factor in the
 14 adjustment?

15 MS. DOMINGUEZ: Your Honor, Dr. Garib was a member
 16 of the board of directors of ACHS since 1988. Federal
 17 funds were committed to ACHS in 1988, were actually
 18 received in January of 1989.

19 Clearly, Judge, his position on the board of
 20 directors put him in a superior position to make
 21 decisions as to how that money was going to be spent.
 22 And in fact, the evidence at trial was that Dr. Garib was
 23 himself involved in giving directions as to how money was
 24 going to be diverted.

25 This money is money that is entrusted to ACHS,

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1 receipt was at a later date.

2 And application note at number one of Guideline
 3 Section 3B1.3 clearly says that for this adjustment to
 4 apply, the position of public or private trust must have
 5 contributed in some significant way to facilitate in the
 6 commission or the concealment of the offense. And in
 7 this case, we argue that Dr. Garib was actively involved
 8 in the conspiracy for overt acts of 1988 up to 1992,
 9 which was proved in the case, but also up to his
 10 appearance before the grand jury, and also his appearance
 11 at the House of Representatives, where he clearly was
 12 asked questions about his involvement and his
 13 participation at ACHS. And he clearly, at all times,
 14 denied any and all participation.

15 So we would submit to the Court that that
 16 application be -- for the two points for abuse of trust
 17 do apply in this case.

18 MR. SREBNICK: May I tender two letters for the
 19 Court to consider. We have two letters. One of them is
 20 already part of the pleading that we filed in response to
 21 your question about medical director.

22 I tender to the Court a copy of the letter that
 23 Dr. Garib submitted the 13th of June of '90, indicating
 24 that he would only continue as the consultant. And then
 25 we have a letter from Roberto Unda, dated 11 February of

1 whether it be federal grant money or federal funding or
 2 whether it be private contributions or money from the
 3 Municipality of San Juan. This is all money which is
 4 being commingled and held in the accounts of ACHS.

5 And clearly, Judge, decisions are being made -- in
 6 fact, Dr. Garib himself signed checks. If the Court will
 7 recall, the Ivan Ramos Cubano checks were signed by
 8 Dr. Garib in 1989, when federal funding was already being
 9 received. And that is expending the money of ACHS.

10 And I don't believe the law imposes upon us a
 11 responsibility to say that dollar for dollar each of
 12 those \$25,000 were federal funds. Clearly, his position
 13 as a member of the board of directors put him in a
 14 position to give instructions and make decisions as to
 15 how the money was going to be spent.

16 THE COURT: Let me take a look at something.

17 I would say that by the very nature of the
 18 application note, number one, and making reference to
 19 that portion of the Garrison case that I cited, the truth
 20 of the matter is that those persons who were on the board
 21 of directors -- and in this case, he was there until July
 22 the 1st, 1990 and participated in the diversion of funds,
 23 federal funds for purposes other than those that the
 24 government had assigned them -- merit the adjustment of
 25 abuse of trust. There is no question about it.

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<p>1 The position enabled him to deal with ways to make 2 the use of this money difficult to detect, and there's no 3 question about the fact that even by 1990, when he 4 resigns from the board, the mechanisms are in place and 5 the funding is in place for that to happen.</p> <p>6 Once again, we have a situation in this case where 7 he resigns in 1990 from the board of directors, continues 8 as a consultant, but surfaces, if you will, again in 9 1992. And later than that, when he appears before the 10 legislature and before the grand jury, in a very sinister 11 way, that kind of confirms, by the very actions, that he 12 undertook his previous involvement in this whole 13 conspiracy. I don't think that under those 14 circumstances, I should exercise the discretion and 15 strike the adjustment. I'm going to leave the adjustment 16 in place.</p> <p>17 Any others?</p> <p>18 MR. SREBNICK: One moment, Your Honor. If the 19 Court will deal with the issue of restitution at this 20 time?</p> <p>21 THE COURT: I think we should. And that, of 22 course, is completely different. The amount may be 23 completely different from that than what I used for loss 24 purposes. So I think we should address that.</p> <p>25 MR. SREBNICK: The issue of restitution, it seems</p>	<p>1 So it would be my suggestion, Judge, that we limit, 2 for restitution purposes, the amount of restitution to 3 those amounts that the government contends were diverted 4 for Dr. Garib's personal benefit. And that's preserving, 5 if I can, the position that I have taken throughout, that 6 when it's a private, for-profit corporation, it seems a 7 little bit backward, if I can use that expression; that 8 Dr. Garib should be reimbursing the corporation. 9 Because, according to the indictment, ACHS was the 10 alleged victim.</p> <p>11 So the irony, of course, is that Dr. Garib would be 12 paying the corporation back money. And he's the owner of 13 the corporation and has the authority to take the money 14 out as profits instead of fringe benefits. I know the 15 Court has rejected that argument.</p> <p>16 THE COURT: But I'm willing to look at the 17 restitution in that light.</p> <p>18 MR. SREBNICK: I would ask the Court to limit the 19 restitution to \$19,549, which is the sum of the monies 20 that went to Florida Rodriguez and Ingar Gonzalez.</p> <p>21 THE COURT: I was thinking more in terms of the 22 monies that went to Ivan Ramos, Florida Rodriguez, and 23 the camera. That would be a total of \$62,746.</p> <p>24 MR. SREBNICK: The point I would make there, the 25 institute used the video camera for institute purposes.</p>
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<p>1 to me, highlights the issue that we're going to be 2 pursuing for appellate purposes -- the disagreement we 3 have, just the interpretation of the law, meaning no 4 disrespect to the government or to Your Honor.</p> <p>5 THE COURT: I understand.</p> <p>6 MR. SREBNICK: But there is a debate among us over 7 how this statute applies to a private corporation, and it 8 seems to me that the irony is that certainly until June 9 of 1990 -- and those are the expenses that I listed them 10 on page nine of my pleading, which are the ones that I 11 think to be the worst-case scenario too, for Dr. Garib. 12 I think that if the Court is going to impose restitution 13 of some sort, it should be limited to those fringe 14 benefits, so to speak, that Dr. Garib may have derived, 15 as the Court may see it; like the housekeeper and the 16 secretary, where the government has calculated it to be 17 somewhere in the neighborhood of 19,000 and change, which 18 were the monies that, if we accept the government's 19 theory, were diverted for Dr. Garib's personal benefit.</p> <p>20 The other funds didn't go to Dr. Garib, and it 21 would seem anomalous for Dr. Garib to be reimbursing the 22 federal government for money, according to the evidence, 23 went to Hector Acevedo, who hasn't been charged and no 24 action has been taken against him for the return of the 25 monies that he received or anybody else received.</p>	<p>1 Somehow it has been misplaced. And I don't think the 2 government is claiming that Dr. Garib stole the camera 3 for use to Dr. Garib on a personal level.</p> <p>4 We know Granados used it, according to his 5 testimony, and it was returned, according to Granados, 6 although he couldn't remember where, when or how. 7 Corcino says it's missing. I think it's unfair to make 8 Dr. Garib pay for the camera that was used by the 9 institute for institute purposes.</p> <p>10 Even if it was loaned for non-institute purposes, 11 Granados seems to be overcharging Dr. Garib, but I 12 understand the Court's position.</p> <p>13 THE COURT: I would say that the only reason why we 14 should include the camera because it is obvious, in light 15 of the evidence, that the camera was used -- the money, 16 if you will -- for activities that had nothing to do with 17 the institute.</p> <p>18 MR. SREBNICK: So what would be left is the Ivan 19 Ramos Cubano checks, and I think, according to Ivan 20 Ramos, went to that politician whose name escapes me -- 21 several politicians. I remember the one episode where he 22 leaves the envelope on the desk.</p> <p>23 MS. DOMINGUEZ: The testimony was that it was for 24 Dr. Borras, for Myrna Passalacqua as well, and Freddie 25 Valentin.</p>

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1 MR. SREBNICK: And the government has recourse
 2 against them, if the government seems to either civilly
 3 or criminally request the return of those funds. So
 4 that's why I would distinguish those expenses.

5 THE COURT: Let me ask the government: What is the
 6 position on restitution?

7 MS. DOMINGUEZ: Your Honor, the Court is inclined
 8 to -- considered the losses specifically with respect to
 9 those transactions or incidents in which Dr. Garib
 10 personally benefited. I would suggest that the Court
 11 consider also the 25,000 political contribution that was
 12 made to Diaz, because even though Dr. Garib was not the
 13 actual recipient of the funds, that that donation was
 14 clearly made at his behest and pursuant to his own
 15 involvement in the political activities of Mr. Diaz,
 16 which would increase the total to \$88,764.

17 I would just like to correct the record, Judge.
 18 The testimony was that the video camera at the most was
 19 used for only two weeks for institute business and was
 20 used for several months by Granados. The testimony has
 21 been uncontested that it was at the -- pursuant to the
 22 efforts of Dr. Garib that that was given to Granados,
 23 that it was offered by Dr. Garib. Dr. Garib signed the
 24 check in payment of the camera, and the testimony also
 25 was from Mr. Granados that it was returned pursuant to

1 MR. SREBNICK: I think that would conclude the
 2 guideline computation and the restitution computation,
 3 and if we could just go over that so we know where we are
 4 at in terms of the guidelines.

5 THE COURT: So actually, if you want to review the
 6 guideline calculation, it would be based on offense level
 7 4, a 13-level increase for loss, a two-level increase for
 8 role, and a two-level increase for more-than-minimal
 9 planning, correct?

10 MR. SREBNICK: Based on the Court's ruling.

11 THE COURT: Actually, the base offense level would
 12 be 25.

13 MS. DOMINGUEZ: And more-than-minimal planning is
 14 two levels.

15 THE COURT: Two points. I'm sorry. So it comes
 16 down to 25, correct?

17 MR. SREBNICK: Based on the Court's ruling over our
 18 objection, yes, that would be the computation.

19 THE COURT: And if that is so, it, the GSR, would
 20 be 57 to 71 months.

21 MR. SREBNICK: Based on that range, yes.

22 And before I move on to the next issue --

23 THE COURT: Give me a minute before we move on to
 24 the other issue. I just want to take a look at
 25 something.

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1 instruction from Dr. Garib.

2 MR. SREBNICK: Before Ms. Dominguez leaves, I think
 3 there was some conflict over the amount of money that
 4 actually went -- if we're going to use the Diaz episode,
 5 I don't think all 25 came from the institute. I think it
 6 was only a check for a smaller amount that actually came
 7 from the institute.

8 MS. DOMINGUEZ: There was \$15,000 in cash that was
 9 provided by Mr. Corcino to Dr. Kouri, but the entire
 10 \$25,000 in cash that was given to Diaz, the testimony of
 11 Corcino was that he was asked on a particular occasion to
 12 come up with 15. But of course, the Court is aware that
 13 Dr. Kouri had access to all this other money that was
 14 being diverted by Medservices and Fundacion Panamericana,
 15 which Mr. Corcino testified was for the purpose of making
 16 these political contributions.

17 THE COURT: If I am going to factor in the payment
 18 to Diaz, I think I should -- I think I should not mess
 19 around with the amount, think the amount should be
 20 25,000.

21 So it's actually Ivan Ramos Cubano, 25,000; Flerida
 22 Rodriguez, 8,149; Ingar Gonzalez, 11,400; the video
 23 camera, 19,215; and the Diaz contribution, 25,000. The
 24 total is 88,764. Any other issue, aside, of course, from
 25 allocution?

1 Fine range 10,000 to 100,000.

2 MR. SREBNICK: What I will do is mark for
 3 sentencing exhibit purposes the -- Dr. Garib's letter of
 4 June 13 of 1990 we discussed before. I'll call that
 5 Garib sentencing Exhibit Number 1.

6 THE COURT: Which I said there is no dispute about
 7 the date; it's effective July the 1st, 1990.

8 MR. SREBNICK: And then the second letter would be
 9 the letter to Dr. Garib in his capacity as the
 10 consultant.

11 THE COURT: That's fine.

12 MR. SREBNICK: And if there's no debate on that, I
 13 don't need to put it in the record. I think we're all in
 14 agreement that July of '90 constitutes the date where he
 15 is no longer medical director. And if necessary we can
 16 have them translated. If we could just submit the
 17 translations at a later date.

18 THE COURT: There is no need for that. You can do
 19 that later before the appeal takes place.

20 MR. SREBNICK: What is left then is our motion for
 21 the Court to consider a downward departure.

22 THE COURT: I told you that I would not exercise
 23 discretion on making a downward departure in this case.
 24 I advanced that in chambers.

25 MR. SREBNICK: I'd like to have an opportunity then

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1 to at least make my record. And what we can do is use
2 that for allocution purposes, so that I don't waste time,
3 since the Court --

4 THE COURT: So that is fair enough.

5 MR. SREBNICK: So the range, as the Court has
6 calculated, would be 57 to 71 months?

7 THE COURT: We have a maximum of 60, which is five
8 years, which is the statutory maximum.

9 MR. SREBNICK: What I would ask the Court to
10 consider, if not for departure, to consider a sentence at
11 the bottom, that it would be relevant to the departure
12 issues.

13 What I would proffer, to save time, since I don't
14 think there is any great debate about this, is much of
15 what we laid out in our written pleading.

16 And the Court sees that the courtroom is filled
17 with people here that are -- with the exception of the
18 press -- that are here on behalf of Dr. Garib. Many of
19 them are family members. Many of them are family members
20 of patients of Dr. Garib. And I can tell the Court, just
21 on a personal level, what I can proffer to the Court.

22 I was with Dr. Garib for the trial, before the
23 trial, and I can't tell the Court the number of times
24 where people stopped us on the street, and stopped him to
25 thank him for the kind of medical attention, personal

1 Dr. Garib, pro bono, on behalf of the patients who were
2 discriminated against, testified on their behalf.

3 THE COURT: That is how life goes, in strange ways.
4 A man who was a physician, there was really no need to
5 touch something like that, even with a 10-foot pole, and
6 here we have it. It is not easy.

7 MR. SREBNICK: I think that irony is that it would
8 be hard to say that Dr. Garib was doing these things for
9 personal gain, when it's clear that, given his private
10 practice and the success that he was experiencing and the
11 success that he could expect, this venture, even in a
12 free enterprise system, was hardly the method for
13 Dr. Garib to become a millionaire.

14 THE COURT: I agree with you. I don't think that
15 that is the motivation. The motivation is different, I
16 think.

17 I've thought of this a lot, myself. As a human
18 being, what can be the motivation behind something like
19 this? And it's our system. It's just I think people get
20 immersed in these power struggles that politics brings
21 about, and you become so immersed that you think that you
22 can control things, you can help to win an election, you
23 can help to do this or the other, assist people, and then
24 you become powerful in that sense. It's a strange kind
25 of power, and you put somebody in office, you help him,

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1 attention he would give to patients, people that
2 Dr. Garib didn't know, because he had treated a son or a
3 daughter or a friend or a relative.

4 The Court may recall I was somewhat ill during the
5 trial, an uncontrollable cough, and the doctor prescribed
6 for me some medication. And the pharmacist recognized
7 Dr. Garib, and said that Dr. Garib had treated her sister
8 for a disease that others said was life threatening. And
9 Dr. Garib, in her mind, saved the life of her sister.

10 It just seems to me that the Court has the power to
11 use Dr. Garib's skill, use his abilities to help the
12 community. And I know the Court has in mind not to
13 depart, but I would certainly proffer the collateral
14 consequences -- the patients that miss his attention, the
15 community that will miss his ability to help. The Court
16 knows about his history, because the Court itself
17 commented, I remember, during jury selection that "I do
18 remember Dr. Garib being on the radio."

19 THE COURT: Sure. I remember watching his TV
20 programs when this whole thing about AIDS came up.

21 MR. SREBNICK: And Dr. Garib reminds that he was
22 apparently a witness before Your Honor.

23 THE COURT: I don't recall that. Perhaps he was.

24 MR. SREBNICK: Where there was some discrimination
25 brought about because of the community of Luquillo, and

1 and then perhaps for another project in the future you
2 may have, it would be easier for you to get something,
3 not necessarily illegally, but it gives you access, if
4 you will. It gives you access, it gives you -- also
5 access to people, inner circles of politicians, things of
6 the sort. This is what happens. You become some sort of
7 power broker, if you will, and here we are.

8 MR. SREBNICK: I guess the unanswered question, and
9 one that apparently I didn't have any success with the
10 jury, was the question of why Dr. Garib, with all that
11 access, all that opportunity, took the steps of
12 distancing himself, disagreeing with taking steps in
13 contradiction to the very source of power that the Court
14 now refers to, and that is the political thing that Kouri
15 had masterminded.

16 And it seems to me a very puzzling question for
17 those that believe that Dr. Garib was guilty. Of course,
18 I'm in a different camp, but for those that do, to
19 understand how it is that Dr. Garib would give that up,
20 if that was his motive, and step into obscurity when he,
21 had he just gone along with Kouri, and could have taken
22 advantage of that which the Court was referring to.

23 THE COURT: I wasn't there; I'm just guessing.
24 That is my -- the only thing that comes to mind.
25 MR. SREBNICK: I don't disagree with the Court. I

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1 think the Court makes an interesting observation, and
 2 it's consistent with my theory that it couldn't have been
 3 for financial gain, because Dr. Garib had the mechanism
 4 to become -- have the monopoly on this market. In 1988,
 5 there were no doctors willing to even compete. They
 6 would send him his clients. And yet he creates a
 7 mechanism for people to receive free medical care, which
 8 in our free enterprise system is quite to the contrary
 9 than that which we teach kids at the Wharton School of
 10 Business is the way to be a success. The way to be a
 11 success, as Bill Gates has apparently learned, is
 12 stifling competition, and now he's paying the price for
 13 it, and Dr. Garib did nothing for it.

14 THE COURT: Other than Flerida and Ingar, which is,
 15 in a sense, minor matter.

16 MR. SREBNICK: Which is quite petty in terms of the
 17 amounts of money that we're talking about here.

18 And to the extent that the Court sees that as some
 19 port to avoid the tax consequences, it's petty, as I see
 20 it -- and meaning no disrespect to the Court or to the
 21 government. But what we're talking about here is
 22 Dr. Garib having the opportunity, had he been motivated
 23 by the lure of dollars, to simply refuse the
 24 municipality's request to have him dedicate his time.

25 And so the Court offers an interesting observation.

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1 My response -- and while I don't disagree with the Court,
 2 it may be that that, in and of itself, shows us why there
 3 are reasons why a departure, why the Court might
 4 otherwise think that the seriousness of the offense is
 5 overstated as it pertains to Dr. Garib.

6 THE COURT: I think it's very serious. I think
 7 it's very serious.

8 MR. SREBNICK: I understand that the crime that's
 9 alleged is an extremely serious crime. But if we look to
 10 Dr. Garib's motives, and if we look to what he did and
 11 what he brought to the Puerto Rico community,
 12 irrespective of the crime, the irony is, without
 13 Dr. Garib, there would have been no real San Juan AIDS
 14 Institute to help the poor people.

15 THE COURT: Without Dr. Kouri, perhaps there would
 16 not be, either.

17 MR. SREBNICK: But Dr. Kouri did not treat
 18 patients. He gets the benefit of the power, and yet
 19 Dr. Kouri never touched a patient. He wasn't even
 20 licensed to practice medicine.

21 So I think he is the person Your Honor is referring
 22 to. He would go around two days a month and flex his
 23 muscle, and in the meantime, the guy who was in the shop,
 24 putting rubber gloves or not putting rubber gloves on --

25 THE COURT: I don't think you should stretch my

1 comment beyond what I meant. I think it is quite clear
 2 what I meant.

3 MR. SREBNICK: In all events, I do think that what
 4 I would proffer to the Court is that there are literally
 5 dozens of people who have contacted us, either directly
 6 or indirectly or here in Court today, who would tell the
 7 Court that if the Court would consider imposing a
 8 sentence, that rather than wasting this person at a
 9 federal camp somewhere in the States, to have him use
 10 what he has always done, help the community. It would
 11 seem to do the point of punishment, and at the same time,
 12 the point of rehabilitation. And the point of making a
 13 person valuable to the community during the next 57 to 60
 14 months that the Court is considering.

15 What I would like to do is just read two letters,
 16 and they're in Spanish, Judge, so I guess I'd as soon
 17 translate them into English.

18 THE COURT: You can read them in Spanish and you
 19 will identify the letter with the name of the person, and
 20 it's part of the record, so then you can translate those
 21 two and have them filed.

22 MR. SREBNICK: This is a letter from Gloria
 23 Vasquez. And I spoke to Ms. Vasquez. She lives over two
 24 hours away from here, a very long drive, and I told her
 25 that I would just read the letter for her. It's a letter

1 dated May of 1991, from Ms. Vasquez to the doctor.
 2 (Reads in Spanish.)

3 Another letter, Your Honor, and the name of this
 4 person I will withhold because this person is a current
 5 patient.

6 (Reads in Spanish.)

7 MR. SREBNICK: There are many people today, Judge,
 8 here who feel that way. I certainly do. It's
 9 interesting. We're here in the year 2000. Ten years
 10 ago, Dr. Garib resigned from the institute, eight years
 11 ago since he had any further involvement, and it just
 12 seems like a great waste, Your Honor.

13 THE COURT: Perhaps the right thing for him to do
 14 then is, when he appeared before the legislature, he
 15 should have said what he knew. When he appeared before
 16 the grand jury, he should said what he knew. If there
 17 were some consequences to them, let's take them. It
 18 would have been a lot better, believe me.

19 MR. SREBNICK: I understand the Court's feelings.
 20 You have the power, Judge --

21 THE COURT: I don't want the power. If there's one
 22 thing that I don't like to have, it's power, and I deny
 23 that power every day to myself. I have to exercise it
 24 because I'm here, sitting now, but I don't want that, I'm
 25 allergic to it.

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1 MR. SREBNICK: Perhaps all that is required then is
 2 mercy and courage, even without power.

3 THE COURT: I'll try to do what I think I should do
 4 respecting law and considering what happened. That's all
 5 I can do.

6 Dr. Garib, do you want to say something on your
 7 behalf?

8 MR. SREBNICK: That's all, Your Honor.

9 THE COURT: Government?

10 MS. DOMINGUEZ: Judge, I'm going to be very brief
 11 in my remarks, because I think that this has been an
 12 arduous process, and I think the Court is well aware of
 13 the facts of this case. And there is really very little
 14 that either Mr. Srebnick or I can add to enlighten the
 15 Court before the Court makes a decision.

16 I think Mr. Srebnick considered what the motivation
 17 could be. If Dr. Garib in fact had the power and had the
 18 opportunity, why did he distance himself? And I think
 19 that it's all how you look at the facts of this case,
 20 because it may well be that Dr. Garib was forced out
 21 because of disagreements that he had with Dr. Kouri.

22 But then, Judge, if in fact he was trying to
 23 distance himself, why would he, in 1992, two years after
 24 he's resigned his position on the board, why would he
 25 make an effort to reintegrate himself into the conspiracy

1 legislature. And this is the same man, Judge, that was
 2 trying to divert \$60,000 away from the institute by
 3 pressuring Tony Fernandez to falsely endorse a check.
 4 This is the same man that was signing checks from the
 5 AIDS Institute for Ivan Ramos Cubano that were going to
 6 be illegal political bribes.

7 It's the same man, Judge. You can't separate one
 8 from the other. And what is precisely saddest about this
 9 case, Judge, when we talked about the den of thieves,
 10 when I got up in the opening statement and I talked to
 11 the jury about the den of thieves that ran this
 12 institute, and if there had been only one honest person
 13 on that board of directors that the scheme could never
 14 have been successful, and Dr. Garib could have been that
 15 one honest person, and he chose not to be.

16 What's sad Judge, is that almost without exception,
 17 every member of that den of thieves was an educated,
 18 respected, accomplished human being that had many other
 19 qualities and that could have a parade of witnesses also
 20 coming before the Court telling you what a wonderful
 21 person they were in other aspects of their lives.

22 But Judge, it is not for those accomplishments that
 23 Dr. Garib or any of the defendants in that case stands
 24 before the Court for sentencing. I would ask the Court
 25 to take all of those things into consideration, and to

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1 again? It's all how you look at it, because maybe Diaz
 2 was his ticket back in. The wheeling and dealing, the
 3 power, the ability to effect major decisions, to control
 4 politicians, what would drive a respected, educated
 5 compassionate physician, someone who more than any of us
 6 in this courtroom knew the plight, the suffering, the
 7 hopelessness of people who were afflicted with AIDS?
 8 What would drive a person like that, Judge, to engage in
 9 a deliberate and sustained effort to divert money away
 10 from those needy people, people who were dying, Judge?

11 Does the fact that Dr. Garib has other undeniable
 12 qualities, that he's an excellent physician, that he is a
 13 dedicated family man, that he has had compassion for his
 14 patients in the past, does that make Dr. Garib's conduct
 15 any less egregious, Judge?

16 THE COURT: The answer is no.

17 MS. DOMINGUEZ: Or does it make it all the more
 18 serious and shocking and alarming, Judge, because this is
 19 a man who knew the needs and the hopelessness of the
 20 patients of the AIDS Institute? And I think that we need
 21 to reconcile, Judge, that this compassionate, caring,
 22 dedicated physician that all of these people have come up
 23 here and lauded about, this is the same man, Judge, who
 24 went before the grand jury and took an oath to tell the
 25 truth, and lied, and did the same thing before the

1 impose a just sentence.

2 THE COURT: Let's make the sentencing findings at
 3 this time. Going back to the presentence report, the
 4 offenses are 18 US Code, Section 371, Conspiracy to
 5 Commit Offense or Defraud the United States, a Class D
 6 felony; and 18 US Code, Section 1623, False Declarations
 7 with the Grand Jury, Class D felony.

8 The base offense level under -- let me first say
 9 this. Two counts of conviction were grouped together
 10 pursuant to Guideline Section 3D1.2(C). And then we look
 11 at Guideline 2K1.1(c), and Guideline 2B1.1, and a base
 12 offense level of four was determined. The parties are in
 13 agreement that that is the base offense level.

14 Regarding loss, we have a finding that the loss
 15 should be \$1,231,835. That brings about a 13-level
 16 increase in the base offense level, making reference to
 17 Guideline Section 2B1.1(b)(1)(A).

18 There is more-than-minimal planning, and a
 19 two-level increase applies under Guideline
 20 Section 2B1.1(b)(4)(A).

21 Regarding role adjustment, we have determined that
 22 the proper adjustment should be plus two points, and that
 23 would be under Guideline Section 3B1.1(b) -- strike that,
 24 3B1.1(c).

25 He was an organizer, leader, manager, supervisor in

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1 a criminal activity. Other than described in A or B
 2 above, rather than three levels or four levels, it's only
 3 two. There is justification for that, not only in the
 4 record we have developed today, but also on the
 5 presentence report.

6 There should also be an upward adjustment of two
 7 points for abuse of a position of trust. We have also
 8 developed that on the record, and that is under 3B1.3.

9 There is also an adjustment for obstruction of
 10 justice, as defined in the guidelines, and in Guideline
 11 Section 3C1.1; and a two-level increase is also
 12 warranted. This brings about a total offense level of
 13 25, criminal history category of one, a Guideline
 14 Imprisonment Range would be, as we said before, 57 to 71
 15 months.

16 The fine range would be 10,000 to 100,000. There
 17 is a statutory maximum that we have to deal with here,
 18 which is 60 months. In other words, the guideline range
 19 exceeds the statutory maximum.

20 MS. DOMINGUEZ: For Count One, Your Honor?

21 THE COURT: For Count One, absolutely. We're
 22 grouping here together, so we have to consider that one.

23 So it is my judgment, the judgment of this Court,
 24 that he will be committed to the custody of the Bureau of
 25 Prisons for a term of 60 months. He will also be fined

1 to apply to appeal in forma pauperis before the Court,
 2 and if he cannot afford the services of attorney on
 3 appeal, he can have the Court appoint an attorney on his
 4 behalf.

5 I don't think he served any time in pretrial
 6 detention, but if he did, that time will be credited
 7 towards his sentence. I will order the transcription of
 8 the sentencing hearing, and have it filed as soon as
 9 possible. Anything else?

10 The issue of bail pending appeal, I'm not
 11 addressing it in writing. Give me until tomorrow to take
 12 a look at this. Very well.

13 MR. SREBNICK: In the event -- one way or the
 14 other, is the court agreeable to voluntary surrender?

15 THE COURT: Voluntary surrender is no problem. I
 16 should tell you that I'm inclined not to grant the motion
 17 for bail pending appeal. I'm looking for some things
 18 there, but voluntary surrender, I'm granting.

19 MR. SREBNICK: In the event that the Court is not
 20 inclined to grant bond pending appeal, then we would
 21 obviously pursue that with the First Circuit.

22 THE COURT: You will have to wait until I enter my
 23 order.

24 MR. SREBNICK: I know that Mr. Dubon is also
 25 raising that request, and we have adopted, though they

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1 in the amount of \$10,000. He will make restitution, in
 2 the amount that I mentioned before, which was 88,764, and
 3 he will serve a term of supervised release of two years
 4 under the following terms and conditions: First, the
 5 defendant will not commit another federal, state, or
 6 local crime and will observe the standard conditions of
 7 supervision recommended by the US Sentencing Commission
 8 and adopted by this Court.

9 The defendant will not possess any controlled
 10 substance, firearms, or other dangerous weapons. He will
 11 provide full disclosure to the probation officer whenever
 12 so requested. He will produce evidence to the probation
 13 officer that he has filed income tax returns to the
 14 Department of Treasury, and that particular amount of
 15 restitution shall be paid during the first 22 months of
 16 supervision.

17 I will not order -- I will suspend mandatory drug
 18 testing in this case.

19 The special monetary assessment of \$200 -- \$100 per
 20 count is imposed.

21 The defendant is advised that he has the right to
 22 appeal the conviction and the sentence by filing a notice
 23 of appeal within ten days from today. He has retained
 24 counsel. He has not claimed the right to appeal in forma
 25 pauperis, but I should let him know that he has a right

1 have not physically filed -- they have also filed a brief
 2 on an additional issue which I footnoted, which is the
 3 issue of a constructive amendment of the indictment.

4 THE COURT: I understand that.

5 MR. SREBNICK: So we would ask the Court, if the
 6 Court is not ready to rule, to grant the motion, to
 7 perhaps wait until the Court has an opportunity to see
 8 Dubon's motion as well.

9 THE COURT: Very well. There's no need for me to
 10 decide that issue immediately. I can wait a few days so
 11 I can take a look at that.

12 MR. SREBNICK: And I will submit a very short reply
 13 to the case.

14 At this time then, I have a notice of appeal, which
 15 I will go ahead and file with Becky in writing at this
 16 time.

17 THE COURT: You should file it today, because I
 18 will enter the formal judgment today.

19 MR. SREBNICK: It's being filed.

20 THE COURT: Anything else?

21 MR. SREBNICK: We preserve all the objections.

22 THE COURT: Everything is preserved.

23 Thank you very much. You're now excused.

24 (Proceedings conclude.)

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1 CERTIFICATION

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4 I certify that the foregoing is a correct
5 transcript from the record of proceedings in the
6 above-entitled matter.

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9 Signature of Court Reporter Date _____

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<p>-\$-</p> <p>\$1 [1] 15:22 \$1,231,835 [1] 68:15 \$1.23 [1] 13:10 \$10,000 [1] 70:1 \$100 [1] 70:19 \$15,000 [2] 19:7 54:8 \$19,549 [1] 51:19 \$2,000 [2] 24:21 44:9 \$200 [1] 70:19 \$200,000 [1] 31:9 \$25,000 [6] 18:13,23 20:21 32:24 48:12 54:10 \$5,000 [2] 33:24,25 \$60,000 [4] 15:9 31:1 31:16 67:2 \$62,746 [1] 51:23 \$88,764 [1] 53:16</p> <p>-1-</p> <p>'80s [1] 8:23 '88 [1] 9:5 '90 [4] 44:6,10 46:23 56:14 '91 [1] 47:1</p> <p>-2-</p> <p>2000 [4] 1:6 8:14 9:6 64:9 22 [1] 70:15 25 [4] 54:5 55:12,16 69:13 25,000 [4] 53:11 54:20 54:21,23 29th [1] 3:7 2B1.1 [3] 68:11,17,20 2K1.1 [1] 68:11</p> <p>-3-</p> <p>30 [1] 36:25 371 [1] 68:4 3B1.1 [2] 68:23,24 3B1.3 [3] 39:10 42:18 43:14 46:3 69:8 3C1.1 [1] 69:11 3D1.2 [1] 68:10</p> <p>-4-</p> <p>4 [2] 55:7 68:20</p> <p>-5-</p> <p>50 [1] 47:5 57 [4] 55:20 57:6 63:13 69:14</p> <p>-6-</p> <p>60 [4] 57:7 63:13 69:18 69:25</p> <p>-7-</p> <p>71 [3] 55:20 57:6 69:14 76 [1] 36:24</p> <p>-8-</p> <p>8,149 [1] 54:22 88,764 [2] 54:24 70:2</p> <p>-9-</p> 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EXHIBIT “B”

Jorge L. Garib Bazain, M.D., A.T.
Reg. No. 17836-069.
Federal Prison Camp.
Maxwell Air Force Base.,
Montgomery, Alabama 36112.

January 18, 2005.

Howard M. Srebnick, Esq.
Black, Srebnick & Korspan, P.A.
Scott A. Srebnick, Esq.
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Dear lawyers,

Recently I learned in the Supreme Court of The United States case decision, US v Booker [No. 04-104] and US v Fanfan [No. 04-105], decided together on January 12, 2005; that I am eligible to claim a Constitutional right violation during my trial and sentence.

It is my belief that the base to claim the violation of the Sixth Amendment arise with decision of the Supreme Court of The United States in Apprendi v New Jersey, 530 US 466, that was submitted in November 1999, argued on March 28, 2000 and decided on June 26, 2000.

Cite: "...any fact that increased penalty for state crime beyond prescribed statutory maximum- other than fact of prior conviction- had to be submitted to jury and proven beyond reasonable doubt."

I was indicted on February 19, 1999. The case proceeded to trial on January 10, 2000. The jury returned a guilty verdict on February 3, 2000.

On February 2, 2000 you submitted to the Honorable Court a list with the supposed "elements" of the crimes to be considered by the Honorable Jury, and those facts identified as crimes by the Jury must be considered the facts relevant to sentencing ["sentencing factors"]. The Honorable Court denied that Constitutional right.

I was found guilty of "Conspiracy" and "Perjury". On July 11, 2000 [two weeks after Apprendi's decision] I appeared in court for sentence. According to the court:

Cite: "Two counts of conviction were grouped together pursuant to Guideline Section 3D1.2(C). And then we look at Guideline 2K1.1(c), and Guideline 2B1.1, and a base offense level of four was determined." [Tr. page 68, lines 9-12].

Then the Honorable Court proceed with a "serial of enhacenments" as follows:

Cite:"Regarding loss, we have a finding that the loss should be \$1,231,835 (but ordered a restitution of \$88,764.) That brings about a 13-level increase in the base offense level, making reference to Guideline Section 2B1.1(b)(4)(A)." [Tr. pag. 68, lines 14-17].

"There is more-than-minimal planning, and two-level increase applies under Guideline Section 2B1.1 (b)(4)(A)." [Tr. pag. 68, lines 18-20].

"He was an organizer, leader, manager, supervisor in a criminal activity. ...There is justification for that, not only in the record we have developed today, but also on the presentence report. (two levels) [Tr. pag. 68 line 25, page 69, lines 1-5].

"...two points for abuse of position of trust. Obstruction of justice, as defined in the Guidelines, two levels." [Tr. pag. 69, lines 6-11].

"This brings about a total offense level of 25 , ... a Guideline Imprisonment Range would be, as we said before, 57 to 71 months"[Tr. pag. 69, 12-15].

The base offense level of four for the two counts may result in up to six (6) months of prison. The Honorable Court even after Apprendi proceed with a serial of "enhancements" according to the Sentencing Guidelines. None of those enhacenments were determined by the Honorable Jury. He may have the "discretion" to consider some facts when he will determine the sentence, but in this case the Court used repetitevely the Sentencing Guidelines, not his discretion.

You know the Order of The United States Court of Appeals for the First Circuit on May 29, 2002.

The Six Amendment violation occurred when the Honorable Court prohibited to the Jury to pass judgement in each "factor or element" of the crime that the Court knows or should know that he will use for enhancement. Also he had the opportunity to correct the error during the sentence because Apprendi was solved two weeks before the sentence.

We claimed in our appeal (although not citing Apprendi) the error committed by the court when prohibited to the jury to performed the Constitutional duties.

See: *Desist v US*, 394 US, at 256; *Mackey v US* 401, US 667, 675; and *Griffith v Kentucky* 479, US 314.

May be it is retroactive and may apply for Habeas Corpus. I started my sentence on February 20, 2003.

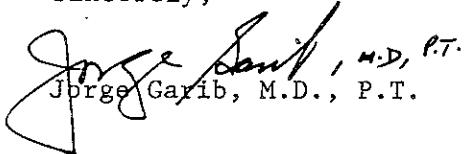
As you know better than me the consequences of Apprendi, Blakely, Booker, and ~~Fayfan~~, may you can see another violation to my Constitutional rights..

I appreciate if you can analyse the case with Scott.

The Dubon lawyers are working in the case and you may feel free to contact Susan in New York.

I would like to know if I am on direct appeal before the Court (District or Appeals) and your impression about the applicability of those law cases to my situation.

Sincerely,



Jorge Garib, M.D., P.T.
Jorge Garib, M.D., P.T.

C: Ramon E. Dapena, Esq.

P.O.Box 70364, San Juan, Puerto Rico 00936-8364.

Tel.: (787) 759-4208.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA, No. 97-091 (JAF)

Hato Rey, Puerto Rico

July 11, 2000

JORGE GARIB BAZAIN,

Defendant.

TRANSCRIPT OF SENTENCING HEARING

BEFORE THE HONORABLE JOSE ANTONIO FUSTE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government: MARIA DOMINGUEZ, AUSA
EDNA ROSARIO, AUSA
US Attorney's Office

For Defendant:

Jorge Garib: CHARLES FITZWILLIAM, ESQ.
HOWARD SREBNICK, ESQ.

Court Reporter:

Donna W. Dratch, RMR, CRR

PROCEEDINGS

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THE COURT: Let's call the case for sentencing.
THE CLERK: For sentencing hearing, Criminal
97-091, United States of America versus Jorge L. Garib
Bazain. On behalf of the government, attorney Maria
Dominguez and Edna Rosario. Defense attorneys, Howard
Srebnick and Charles Fitzwilliam.

THE COURT: I had a short meeting with counsel in
chambers, and one of the things that I heard is that the
defendant wishes to present some short evidence. I might
as well hear that first before we even deal with the
different objections, because that may assist me in
dealing with some of that.

MR. SREBNICK: Very well, Your Honor.

Howard Srebnick on behalf of Dr. Garib, who is
present before the Court.

I know Your Honor has received the letters that we
submitted to the Court. Some of the people that wrote
letters would also like to have a very brief opportunity
to address the Court, if I could.

Ms. Santiago, please come forward.

THE INTERPRETER: Will you need a translation?

MR. SREBNICK: No, it will be in English. And they
wrote a letter too, Your Honor.

1 THE COURT: Do you want to do it by questions and
2 answers?

3 MS. SANTIAGO: Good morning, Judge. Let me begin
4 by introducing myself -- my name is Sonia Santiago -- and
5 my sister, Sandra Santiago. We are both attorneys, and
6 our offices are located in Bayamon, Puerto Rico.

7 I wrote you a letter dated June 29th of this year
8 on behalf of Dr. Garib. I'd like to have the opportunity
9 to read the letter for the record, if I may.

10 "Dear Judge Fuste,

11 "Let me begin by introducing myself. My name is
12 Sonia Santiago, and I am a practicing attorney
13 with offices in Bayamon, Puerto Rico. It has
14 been brought to my attention that the sentencing
15 date for Dr. Jorge Garib is July 11th of this
16 year. I'd like to take this opportunity to
17 express a few words on behalf of such an
18 extraordinary human being."

19 I also speak for my sister and fellow attorney
20 Sandra Santiago. She's here next to me.

21 I met Dr. Garib many years ago. That was when I
22 referred him a HIV client for treatment.

23 I didn't include in the letter, but at the
24 time, this was a very dear person to me, and I personally
25 took the person to see Dr. Garib. I didn't know him. I

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1 knew about him by the newspapers and those type of
2 things. Even when I was residing in New Jersey, when I
3 was a practicing attorney there, I knew about Dr. Garib.

4 When this person came to my office, he was very
5 sick. I really wanted to make sure that he got the best,
6 so I called Dr. Garib. I set up an appointment, and I
7 took the person with me. That was the first opportunity
8 that I had to meet him.

9 and I'm very nervous today, and I really love
10 him, and I'm very emotional, so you have to excuse me.

11 THE COURT: I understand that fully.

12 A. When I met Dr. Garib, what impressed me the most
13 was his human side.

14 I took him a person who has no financial means.

15 That was not a problem with him. He provided the
16 treatment. He provided not only medical treatment, human
17 care, and he was with that person for many years.

18 After that, I developed a good relationship
19 with him, and my relationship turned into a professional
20 one. I began using Dr. Garib for different cases that I
21 had in my office. On some occasions, I couldn't pay him
22 because my client couldn't pay me. So I couldn't pay
23 Dr. Garib. He never rejected a case. He always was there.

24 I had meetings with him. I had conferences.
25 On a couple of occasions, he wrote expert reports at no

1 MR. SREBNICK: Perhaps all that is required then is
 2 mercy and courage, even without power.

3 THE COURT: I'll try to do what I think I should do
 4 respecting law and considering what happened. That's all
 5 I can do.

6 Dr. Garib, do you want to say something on your
 7 behalf?

8 MR. SREBNICK: That's all, Your Honor.

9 THE COURT: Government?

10 MS. DOMINGUEZ: Judge, I'm going to be very brief
 11 in my remarks, because I think that this has been an
 12 arduous process, and I think the Court is well aware of
 13 the facts of this case. And there is really very little
 14 that either Mr. Srebnick or I can add to enlighten the
 15 Court before the Court makes a decision.

16 I think Mr. Srebnick considered what the motivation
 17 could be. If Dr. Garib in fact had the power and had the
 18 opportunity, why did he distance himself? And I think
 19 that it's all how you look at the facts of this case,
 20 because it may well be that Dr. Garib was forced out
 21 because of disagreements that he had with Dr. Kouri.

22 But then, Judge, if in fact he was trying to
 23 distance himself, why would he, in 1992, two years after
 24 he's resigned his position on the board, why would he,
 25 make an effort to reintegrate himself into the conspiracy

1 legislature. And this is the same man, Judge, that was
 2 trying to divert \$60,000 away from the institute by
 3 pressuring Tony Fernandez to falsely endorse a check.
 4 This is the same man that was signing checks from the
 5 AIDS Institute for Ivan Ramos Cubano that were going to
 6 be illegal political bribes.

7 It's the same man, Judge. You can't separate one
 8 from the other. And what is precisely saddest about this
 9 case, Judge, when we talked about the den of thieves,
 10 when I got up in the opening statement and I talked to
 11 the jury about the den of thieves that ran this
 12 institute, and if there had been only one honest person
 13 on that board of directors that the scheme could never
 14 have been successful, and Dr. Garib could have been that
 15 one honest person, and he chose not to be.

16 What's sad Judge, is that almost without exception,
 17 every member of that den of thieves was an educated,
 18 respected, accomplished human being that had many other
 19 qualities and that could have a parade of witnesses also
 20 coming before the Court telling you what a wonderful
 21 person they were in other aspects of their lives.

22 But Judge, it is not for those accomplishments that
 23 Dr. Garib or any of the defendants in that case stands
 24 before the Court for sentencing. I would ask the Court
 25 to take all of those things into consideration, and to

1 again? It's all how you look at it, because maybe Diaz
 2 was his ticket back in. The wheeling and dealing, the
 3 power, the ability to effect major decisions, to control
 4 politicians, what would drive a respected, educated
 5 compassionate physician, someone who more than any of us
 6 in this courtroom knew the plight, the suffering, the
 7 hopelessness of people who were afflicted with AIDS?
 8 What would drive a person like that, Judge, to engage in
 9 a deliberate and sustained effort to divert money away
 10 from those needy people, people who were dying, Judge?

11 Does the fact that Dr. Garib has other undeniable
 12 qualities, that he's an excellent physician, that he is a
 13 dedicated family man, that he has had compassion for his
 14 patients in the past, does that make Dr. Garib's conduct
 15 any less egregious, Judge?

16 THE COURT: The answer is no.

17 MS. DOMINGUEZ: Or does it make it all the more
 18 serious and shocking and alarming, Judge, because this is
 19 a man who knew the needs and the hopelessness of the
 20 patients of the AIDS Institute? And I think that we need
 21 to reconcile, Judge, that this compassionate, caring,
 22 dedicated physician that all of these people have come up
 23 here and lauded about, this is the same man, Judge, who
 24 went before the grand jury and took an oath to tell the
 25 truth, and lied, and did the same thing before the

1 impose a just sentence.

2 THE COURT: Let's make the sentencing findings at
 3 this time. Going back to the presentence report, the
 4 offenses are 18 US Code, Section 371, Conspiracy to
 5 Commit Offense or Defraud the United States, a Class D
 6 felony; and 18 US Code, Section 1623, False Declarations
 7 with the Grand Jury, Class D felony.

8 The base offense level under -- let me first say
 9 this. Two counts of conviction were grouped together
 10 pursuant to Guideline Section 3D1.2(C). And then we look
 11 at Guideline 2K1.1(c), and Guideline 2B1.1, and a base
 12 offense level of four was determined. The parties are in
 13 agreement that that is the base offense level.

14 Regarding loss, we have a finding that the loss
 15 should be \$1,231,835. That brings about a 13-level
 16 increase in the base offense level, making reference to
 17 Guideline Section 2B1.1(b)(1)(A).

18 There is more-than-minimal planning, and a
 19 two-level increase applies under Guideline
 20 Section 2B1.1(b)(4)(A).

21 Regarding role adjustment, we have determined that
 22 the proper adjustment should be plus two points, and that
 23 would be under Guideline Section 3B1.1(b) -- strike that,
 24 3B1.1(c).

25 He was an organizer, leader, manager, supervisor in

1 a criminal activity. Other than described in A or B
 2 above, rather than three levels or four levels, it's only
 3 two. There is justification for that, not only in the
 4 record we have developed today, but also on the
 5 presentence report.

6 There should also be an upward adjustment of two
 7 points for abuse of a position of trust. We have also
 8 developed that on the record, and that is under 3B1.3.

9 There is also an adjustment for obstruction of
 10 justice, as defined in the guidelines, and in Guideline
 11 Section 3C1.1; and a two-level increase is also
 12 warranted. This brings about a total offense level of
 13 25, criminal history category of one, a Guideline
 14 Imprisonment Range would be, as we said before, 57 to 71
 15 months.

16 The fine range would be 10,000 to 100,000. There
 17 is a statutory maximum that we have to deal with here,
 18 which is 60 months. In other words, the guideline range
 19 exceeds the statutory maximum.

20 MS. DOMINGUEZ: For Count One, Your Honor?

21 THE COURT: For Count One, absolutely. We're
 22 grouping here together, so we have to consider that one.

23 So it is my judgment, the judgment of this Court,
 24 that he will be committed to the custody of the Bureau of
 25 Prisons for a term of 60 months. He will also be fined

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1 to apply to appeal in forma pauperis before the Court,
 2 and if he cannot afford the services of attorney on
 3 appeal, he can have the Court appoint an attorney on his
 4 behalf.

5 I don't think he served any time in pretrial
 6 detention, but if he did, that time will be credited
 7 towards his sentence. I will order the transcription of
 8 the sentencing hearing, and have it filed as soon as
 9 possible. Anything else?

10 The issue of bail pending appeal, I'm not
 11 addressing it in writing. Give me until tomorrow to take
 12 a look at this. Very well.

13 MR. SREBNICK: In the event -- one way or the
 14 other, is the court agreeable to voluntary surrender?

15 THE COURT: Voluntary surrender is no problem. I
 16 should tell you that I'm inclined not to grant the motion
 17 for bail pending appeal. I'm looking for some things
 18 there, but voluntary surrender, I'm granting.

19 MR. SREBNICK: In the event that the Court is not
 20 inclined to grant bond pending appeal, then we would
 21 obviously pursue that with the First Circuit.

22 THE COURT: You will have to wait until I enter my
 23 order.

24 MR. SREBNICK: I know that Mr. Dubon is also
 25 raising that request, and we have adopted, though they

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1 in the amount of \$10,000. He will make restitution, in
 2 the amount that I mentioned before, which was 88,764, and
 3 he will serve a term of supervised release of two years
 4 under the following terms and conditions: First, the
 5 defendant will not commit another federal, state, or
 6 local crime and will observe the standard conditions of
 7 supervision recommended by the US Sentencing Commission
 8 and adopted by this Court.

9 The defendant will not possess any controlled
 10 substance, firearms, or other dangerous weapons. He will
 11 provide full disclosure to the probation officer whenever
 12 so requested. He will produce evidence to the probation
 13 officer that he has filed income tax returns to the
 14 Department of Treasury, and that particular amount of
 15 restitution shall be paid during the first 22 months of
 16 supervision.

17 I will not order -- I will suspend mandatory drug
 18 testing in this case.

19 The special monetary assessment of \$200 -- \$100 per
 20 count is imposed.

21 The defendant is advised that he has the right to
 22 appeal the conviction and the sentence by filing a notice
 23 of appeal within ten days from today. He has retained
 24 counsel. He has not claimed the right to appeal in forma
 25 pauperis, but I should let him know that he has a right

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1 have not physically filed -- they have also filed a brief
 2 on an additional issue which I footnoted, which is the
 3 issue of a constructive amendment of the indictment.

4 THE COURT: I understand that.

5 MR. SREBNICK: So we would ask the Court, if the
 6 Court is not ready to rule, to grant the motion, to
 7 perhaps wait until the Court has an opportunity to see
 8 Dubon's motion as well.

9 THE COURT: Very well. There's no need for me to
 10 decide that issue immediately. I can wait a few days so
 11 I can take a look at that.

12 MR. SREBNICK: And I will submit a very short reply
 13 to the case.

14 At this time then, I have a notice of appeal, which
 15 I will go ahead and file with Becky in writing at this
 16 time.

17 THE COURT: You should file it today, because I
 18 will enter the formal judgment today.

19 MR. SREBNICK: It's being filed.

20 THE COURT: Anything else?

21 MR. SREBNICK: We preserve all the objections.

22 THE COURT: Everything is preserved.

23 Thank you very much. You're now excused.
 24 (Proceedings conclude.)

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing legal instrument:
“motion under 28, U.S.C. §2255”; “Petition for writ of habeas corpus pursuant to the
legal authority found in title 28, U.S.C. §2255, with memorandum of law”; and
“Appendix” was served on this 11th day of January, 2006, through the U.S. postal service
to:

1) Humberto Garcia, Esq.,
Attorney General
Department of Justice
P.O. Box 902192
San Juan, PR 00902-0192

Certified Mail # 7004-0750-0000-9311-7282

Respectfully submitted,

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